Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1999

JOSEPH VENDETTO

VERSUS

SONAT OFFSHORE DRILLING, INC.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

Respectfully Submitted,

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QUESTIONS PRESENTED FOR REVIEW

Question No. 1.

Whether this case should be remanded back to the trial court for retrial under the new standard of care (which determines liability in this matter) which new standard of care had its genesis in a decision which was issued by the United States Fifth Circuit Court of Appeals, *en banc*, after the state intermediate appellate court already had jurisdiction of this matter. *See Gautreaux v. Scurlock Marine, Inc.*, 107 F. 3d 331 (5th Cir. 1997) *en banc*.

Question No. 2.

Whether the petitioner, Joseph Vendetto, was denied Due Process by the fact that the appeals court used a different liability imposing standard than was extant at the time of trial, to reverse the trial court's ruling. Petitioner avers that the case should have been remanded for a new trial on liability as was the case in *Crawford v. Falcon Drilling*, 113 F. 3d 1220 (5th Cir. 1997) as well as in *Gautreaux* itself.

PARTIES TO THE PROCEEDING

Counsel for petitioner hereby sets forth that the only parties to this proceeding, including any parent, subsidiary or related companies who would have any interest in this matter, are the parties themselves, Joseph Vendetto and Sonat Offshore Drilling Company.

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CITATIONS OF REPORTS OF CASE *SUB JUDICE*

1. *Joseph Vendetto v. Sonat Offshore Drilling Co.*, Civil Action No. 93675, 16th Judicial District Court, Parish of St. Mary, State of Louisiana, 16 November 1995.

2. *Joseph Vendetto v. Sonat Offfshore Drilling Co.*, 701 So. 2d 243 (La. App. 1st Cir. 1997).

3. *Joseph Vendetto v. Sonat Offshore Drilling Co.*, 715 So.2d 1194 (La. 1998) (Grant of *Certiorari).*

4. *Joseph Vendetto v. Sonat Offshore Drilling Co.*, 725 So.2d 474 (La. 1999)(Opinion of the Supreme Court of Louisiana).

5. *Joseph Vendetto v. Sonat Offshore Drilling Co.*, No. 97-C-3103 (Feb. 12, 1999) (Denial of Application for Rehearing).

STATEMENT REGARDING JURISDICTION

The opinion of the Supreme Court of Louisiana which is sought to be reviewed in this case was rendered on 20 January 1999. Joseph Vendetto timely filed an application for rehearing on 2 February 1999, but this application for rehearing was denied by the Supreme Court of Louisiana on 12 February 1999. Joseph Vendetto has 90 days forward of that date to petition this court for writs of certiorari, and this petition is timely filed, as it is less than 90 days forward of the denial of the application for rehearing. This court has jurisdiction to entertain this appeal pursuant to 28 U.S.C. §1254 and §1257.[1]

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[1] The latter provision is applicable at this case involves rights existing under the Jones Act, 46 U.S.C. §688(a), and it also involves Due Process considerations which are covered by the 5th and 14th Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES APPLICABLE TO THIS CASE

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeapardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Jones Act, 46 U.S.C. §688(a):

Recovery for Injury to or Death of Seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply, and in the case of the death of any seaman as a result of such personal injury the personal representative of such seaman may maintain an action for damages at law with a right of trial by jury, and such action of statutes of the United States concerning or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

On 19 January 1993 Joseph Vendetto was employed as a seaman aboard D/S DISCOVERER 534, a dynamic positioning drillship owned by Sonat Offshore Drilling Company. On that day Mr. Vendetto was injured in the course of scope and his employment, and he ultimately underwent neck surgery which disabled him from his work offshore.[2] This case was tried to the bench, to District Court Judge William

[2] It should also be noted that Mr. Vendetto was learning disabled, and this tremendously reduced his prospects for gainful employment in a non-manual labor type setting, from which labor he is now medically disqualified.

D. Hunter in St. Mary Parish, Louisiana. After receiving all of the evidence, and post-trial briefing from both parties, the District Court Judge rendered an opinion which found Sonat Offshore Drilling Company liable pursuant to the Jones Act, 46 U.S.C. §688(a), and which also imposed liability upon Sonat Offshore Drilling Company for the unseaworthiness of D/S DISCOVERER 534, which claim is cognizable under the general maritime law of the United States. The court awarded the plaintiff over $1,000,000.00 in damages to compensate him for this career ending injury and his loss of income.[3]

After the judgment was entered, Sonat Offshore Drilling Company appealed this matter to the Louisiana First Circuit Court of Appeals. The parties briefed the issues and submitted the case for decision by a three judge panel of the First Circuit Court of Appeals, but after all of this was done, the United States Fifth Circuit Court of Appeals issued its ruling in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) *en banc*, in which it articulated a new liability standard for cases brought prrsuant to the Jones Act, 46 U.S.C. §688(a). At this time, and despite the fact that the case had been tried under a different standard, under different law, and that the case had already been submitted for decision to the Louisiana First Circuit Court of Appeals, Sonat Offshore Drilling Company then filed supplemental briefs attempting to have the First Circuit Court of Appeals overturn the District Court's decision on the basis of *Gautreaux*. Joseph Vendetto opposed this issue as coming too late (in his brief of 30 May 1996). However, when the Louisiana First Circuit

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[3] *Joseph Vendetto v. Sonat Offshore Drilling Co.* C.A. No. 93675, 16th Judicial District Court (16 November 1995).

Court of Appeals finally ruled[4], in a 2-1-2 decision of a new five judge panel, the majority opinion erroneously stated that "retroactive application of the new law is permissible"[5], and used this new standard of care as an excuse to overrule the District Court's well articulated factual findings of Jones Act negligence and general maritime law unseaworthiness. Given this obvious and grave legal error on the part of the First Circuit Court of Appeals, the plaintiff sought a rehearing in that court, but this was denied on 12 November 1997, with two judges dissenting from the denial of rehearing. Plaintiff then sought writs of *certiorari* from the Louisiana Supreme Court, which writ was granted, 715 So.2d 1194 (La. 1998) The Supreme Court of Louisiana then issued its opinion in the case and, despite Joseph Vendetto's protestations that the *Gautreaux* standard of liability cannot be applied retroacively in this case, it simply ignored the issue[6] and affirmed, 6 to 1, the opinion of the Louisiana First Circuit Court of Appeals 725 So. 2d 474 (La. 1999). Joseph Vendetto applied for rehearing from this ruling of the Supreme Court of Louisiana, But this application was denied on 12 February 1999.[7]

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[4] *Vendetto v. Sonat Offshore Drilling Co.*, 701 So. 2d 243 (La. App. 1st Cir. 1997).

[5] 701 So. 2d at 246.

[6] The retroactivity problem was not addressed in a single sentence in the Louisiana Supreme Court's opinion.

[7] Joseph Vendetto objected to the retroactive application of *Gautreaux* to his case on many occasions. He objected immediately after the issue was raised for the first time while the case was pending in the First Circuit Court of Appeals, by filing a supplemental and responsive brief on 31 May 1997. Next, Mr. Vendetto objected to the retroactive application of *Gautreaux* in his original brief filed with the Supreme Court of Louisiana on 14 April 1998. Joseph Vendetto has fully preserved this issue for appeal.

RULE 10 STATEMENT REGARDING WRIT GRANT CONSIDERATIONS

As is demonstrated by the procedural histsory of this case, Mr. Vendetto was denied due process of law by the fact that there was a retroactive application of a substantive change in the law in his case. This retroactive application came long after the case was tried (under a different standard) and even after the case had been submitted to the intermediate appellate court for decision. The United States Fifth Circuit Court of Appeals has noted that this substantive change in the law, created by *Gautreaux,* required remand to the trial court for new trial under the newly articulated standard set forth in *Gautreaux. See Crawford v. Falcon Drilling Co.,* 113 F. 3d 1220 (5th Cir. 1997). Under Rule 10 of the Supreme Court Rules, this demonstrates that *certiorari* is appropriate in the case.

Under Rule 10(a) of the Supreme court Rules, the decisions of the Louisiana state courts in this case, both the Louisiana First Circuit Court of Appeals and the Supreme court of Louisiana, directly conflict with the decision set forth by the United States Fifth Circuit Court of Appeals in *Crawford v. Falcon Drilling Co., supra.*[8] Consequently, this is the classic type of conflict which Rule 10(a) cites as an appropriate basis for this court to grant writs of *certiorari.*

Additionally, *certiorri* would be appropriate under Rule 10(b) of the Supreme court Rules, as the Supreme Court of Louisiana has decided this important federal question in a way which is adverse to the rule articulated by the United States Fifth Circuit Court of Appeals. The United States Fifth Circuit Court of Appeals recognized in *Crawford v. Falcon*

Drilling Co., supra, that retroactive application of this new *Gautreaux* standard would work material prejudice to the parties in the case, in violation of Due Process[9] This is an important question of federal law as respects Due Process, and it is also a very important question of federal law as respects the multitude of Jones Act, 46 U.S.C. §688(a), claims which were in the appellate pipeline at the time *Gautreaux* was decided. This is a very important federal question, and it is truly important to Joseph Vendetto, who suffered a career ending injury and who has been left without any compensation whatsoever as a result of this career ending injury. As a result of the Supreme Court of Louisiana's decision in *Vendetto,* there is a direct conflict as to how these post-*Gautreaux* types of cases are to be handled within the federal appellate system and within Louisiana's state appellate system. This is an issue of tremendous importance and it needs to be resolved by this court.

Finally, Rule 10(c) of the Supreme Court Rules further militates in favor of granting certiorari in this case. Both a state court and a United States Court of Appeals has decided this important question of federal law, but as there is a conflict, this certainly needs to be resolved by the United States Supreme Court. All of the Jones Act claims in the

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[8] Remand was also required in *Gautreaux,* so this is an additional conflict.

[9] The Fifth Amendment Due Process protections are made applicable to state courts through Section 1 of the 14th Amnendment to the United States Constitution. Retroactive application of this newly articulated rule to a pending case would run afoul of the rules established by this court in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) and *Northern Pipeline Const. Co. v. Marathon Pipeline Co.,* 458 U.S. 50, 102 S.Ct. 2858, 2880 (1982).

country which are affected by this *Gautreaux* modification of the standard of care owed to seamen by their employers need to know how to properly handle these cases on appeal, which Mr. Vendetto contends is to remand for a new trial under the new law. Based upon all of these considerations, Joseph Vendetto respectfully prays that his petition for writs of *certiorari* be granted.

Respectfully Submitted,

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APPENDIX 1

JOSEPH VENDETTO	16TH JUDICIAL DISTRICT COURT
vs. No. 93675	PARISH OF ST. MARY
SONAT OFFSHORE DRILLING COMPANY	STATE OF LOUISIANA

For the Plaintiff: Timothy J. Falcon, Esq.
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REASONS FOR JUDGMENT

PROCEDURAL HISTORY

Joseph Vendetto was employed by the defendant, Sonat Offshore Drilling Company (Sonat) for over six years, until his alleged injury occurred on or about January 19, 1993. He worked on the *DISCOVERER 534*, a vessel owned and operated by Sonat, and it was on this vessel that the alleged injury occurred. The plaintiff was in the course and scope of his employment when he was injured. The plaintiff claims that the injury occurred when he was in the process of lowering a chain full without the use of any mechanical assistance during the course of a 6000 hour SAM (a routine maintenance

procedure performed every 6000 hours of operation). The defendant denies that he was injured in that manner. This case is governed by the Jones Act and the general maritime law.

The plaintiff sets forth two theories of recovery—negligence under the Jones Act and the unseaworthiness of the *DISCOVERER 534*. Plaintiff prays for relief for injuries and damanges suffered including but not limited to: past, present and future pain and suffering; past, present and future mental anguish; past, present and future humiliation; past, present and future emotional distress; past, present and future lost wages; other general and special damages, and the defendant be charged with all cost of these proceedings.

The defendant, Sonat Offshore Drilling, denies all allegations of the petition concerning its liability for the injury suffered by the plaintiff. The defendnt denies that it was negligent in any way, and asserts the the *DISCOVERER 534* was seaworthy at all time relevant. The defendant also alleges that if negligence was the cause of this incident, such negligence is attributable, in whole or in part, to the plaintiff.

A trial on the merits was held in this case on March 27 and 28, 1995, in Iberia Parish.

FACTS

Mr. Vendetto is now 29 years old. He weighed approximately 150 pounds and was between the height of 5'7" and 5'8" when he was injured. The plaintiff only has a tenth grade education because of his problems with dyslexia. It is agreed by all parties that he is a seaman for Jones Act purposes.

The plaintiff took and passed a physical in August of 1987, before he went to work on board the *DISCOVERER 534*, which is a drill ship. The plaintiff testified that over the years at Sonat he received promotions with accompanying pay raises. He also testified to a couple of demotions and admitted that he was laid off briefly in 1992. However, he claims that he was generally rising through the ranks at Sonat through promotions and accompanying pay raises. His projected income, for year he was injured, was around $32,000.00.

Mr. Vendetto has one child, a daughter, who is six years old. He shares joint custody of the child with the child's mother. On his days off he liked to hunt, fish and ski.

Before this incident the plaintiff had worked on two or three previous 6,000 hour SAMs. A SAM is a maintenance operation on a thruster. Mr. Vendetto testified that he learned how to do a 6,000 hour SAM from watching others do them and assisting, but that he had never performed one by himself. On January 19, 1993, a Tuesday, the defendant was ordered to do a 6000 hour SAM on thruster number two (T2). The order was given by John Kelly, the chief engineer and one of the plaintiff's supervisors. Part of the procedure for the SAM, is that the thruster has to be raised had moved to a less crowded area. Mr. Brokaw, who was also the plaintiff's supervisor, classified as Mechanic 1, was assisting in the SAM with Mr. Vendetto. The plaintiff testifies that he did not have a meeting with Mr. Kelly before starting the operation to discuss what was going to happen in the operation. He said that he knew what he was supposed to do through the process of seeing others doing it before. He also says that he does not recall either Mr. Kelly or Mr. Brokaw going any kind of Four Point Plan with him where they

discussed lifting techniques before starting the SAM.

At the beginning of the SAM, the seamen would put down a scaffolding (staging). Mr. Vendetto was there when they were doing it, but he was getting his tools ready. He testified that he took out the chain falls, both a one and a two ton. The two ton weights about 30 to 40 pounds. He testified that a rope was used to lower the tools and falls.

Mr. Vendetto testified that he lowered the tools hand over hand over the handrail next to the A-frame. He was working with Eugene Orcutt at the time who was down below. The plaintiff said that he lowered the tools in the manner that he had seen his fellow workers and supervisors use. Mr. Vendetto said that he felt a pain in his neck when he was lowering the chain fall, but he continued working. There was no mechanical equipment available at the time to help lower the tools. The plaintiff said that he learned how to lower tools by watching others on board.

The plaintiff claims that he was injured on January 19, 1993, but admits that the report to the medic on board was typed up on January 21, 1993. Mr. Vendetto claims that he felt numb at the time of the injury and that he felt more numbness as he continued working. He felt numbness in his neck, shoulder and right arm. Despite this, he continued working. He was not able to lower the tools straight down, nor did he use a wrap as he was lowering the tools. He testified that he did not use the wrap because there was not enough room to do so. He claims that it would have been pointless to use the wrap, because he would have still had to pick up the tools to get them away from the ladder so they would not hang up on any obstructions. The plaintiff said

that he was leaning over the handrail as he lowered the tools. Then he went downstairs and hung the chain falls into the pad eye to pull the A cap off. The witness says that at this point, he was on top of the pad eye and Mr. Orcutt handed him the chain falls so that he could hook them on to the A cap. After lowering the tools, he had to remove oil from the pod by pulling buckets up from inside it. He says that he was helped in this task by Orcutt, his immediate supervisor, and Brokaw. He testified that he was feeling numbness in his neck, shoulder and right arm, but that he continued working the rest of the day.

At six o'clock that evening they stopped working. He testified they work in twelve hour shifts, from 6:00 A.M. to 6:00 P.M. The plaintiff says that he could not really sleep because of his neck and shoulder, but he did not report to anyone that day because he did not really believe that he was hurt. Rather, he thought that he had just used muscles that he did not ordinarily use. On the morning of January 20, a Wednesday, the plaintiff testified that he did not feel much pain until he started working. That day he pulled the chain falls out of T2 which involved a lot of climbing and a lot of lifting of the chain falls. Noone was assisting him at this point.

The plaintiff testified that on Wednesday night he was sore and he felt numbness in his neck and right arm. He reported to Jody Roher, the medic on the rig. He testified that she told him that she believed it was a pulled muscle and they decided to wait and see how it felt in the morning. She told the plaintiff to take it easy. On that Thursday, the plaintiff said that he was sore in his neck and right arm and went back to talk to Jody Roher. He says that she told him to take

it easy and that they wrote the medical report that night, the 21st. The witness said that he filled out a handwritten report and then Ms. Roher typed it up.

There was a meeting at seven o'clock the next morning, which was Friday, attended by Rick Gunnels, the assistant superintendent, John Kelly, Robert Newbury, John Reddington, Captain Stember and Jody Roher. According to Mr. Vendetto, Ms. Roher had given both the handwritten and typed report to Mr. Gunnels. Mr. Vendetto said that he explained at the meeting what had happened to him that week. He said he told them the same story as was written on the reports. At the meeting it was decided that Mr. Vendetto would go to see a doctor and come back either that day or whenever, depending on what the doctor said.

Mr. Vendetto went to see Dr. Aiken, who also thought it was a pulled muscle, and put the plaintiff on bed rest. He stayed on bed rest for a week, but the pain got worse and worse, so he called Dr. Aiken back and arranged another visit. When he went back, he was given a MR1 and it was discovered that he had a ruptured disk. This was discovered one-and-a-half to two weeks after the accident. Dr. Aiken suggested an operation and, after some thought and discussion with his mother, the plaintiff agreed. Mr. Vendetto had the surgery and was in the hospital three to four days and in bed for about two weeks after. He was put in a soft collar and stimulator. He was supposed to wear the soft collar for six weeks, and then whenever necessary. He was in the stimulator for three weeks.

The plaintff testified that he spent the next six months in recovery. At first he said that he was not in a lot of pain,

and he was unable to do a lot of things. His arm still hurt and he went to physical therapy, which included sweeing a chiropractor and attending occupational therapy. He became depressed when he was told by the occupational therapist that he could not return to his previous job.

Mr. Vendetto testified that presently he is working in a gas station/fishing supply store as a cashier for $4.50 an hour. He cannot read or write very well. He is limited in what he can do because of pain and numbness in his right arm and shoulder. Dr. Aiken said that this would be lifelong and he would always be restricted as to what he could lift.

At Sonat, Mr. Vendetto received health insurance, had a saving plan, and had access to a credit union, none of which is available to him at his present job. He testified that before his injury he had expectations that he would be able to rise through the ranks in the mechanics department at Sonat. He is limited now in activities that he enjoyed such as hunting and fishing and can no longer ski. He can no longer pick up his daughter nor do certain activities with her.

On cross-examination Mr. Vendetto testified that the scaffolding did not extend completely from below the ladder to the edge of the thruster tunnel and that he had to stretch to get across. He admitted that there is a place on the handrail where one can lower the tools without having to worry about obstructions, and that he had lowered tools from that point before. He testified that he had seen and used wraps, but that they were not normally used to lower tools. He admitted that he had sometimes used wraps when lowering tools for a SAM. The witness also said that if a wrap is used, then you can control the load and there is no load on the

person lowering the tools. He added, though, that wraps were usually used to hold really heavy things in place. The witness said that he knew that using a wrap was a safe way to lower the tools.

Mr. Vendetto testified that Sonat had self-lifting tapes and safety meetings and placards set out around the rig on safe lifting techniques. The plaintiff said that he saw the placards and that they said to lift with the legs and keep the back straight. He said that was the technique that they had been taught and which he used. They had safety meetings once a week, which he attended, and placards also set out around the rig showing proper lifting technique.

The plaintiff is not sure who lowered the chain falls, whether it was Eugene Orcutt or himself, but that he did the majority of the lifting and lowering. The plaintiff said that he had done everything he did that day on other occasions, and that his superiors had seen him do all of it before. He stated that he had seen the wrap but it had never really been explained to him.

Mr. Vendetto claims that he first spoke to Ms. Judy Roher, the medic, on the 19th, after he got off of work, but that it was done in the radio room. He said that he only talked to her and that nothing was prescribed or reported. He agreed that he did not receive any medicine from the medic until the 20th. He also states that he did not tell John Kelly, Eugene Orcutt, or Charles Brokaw that anything was wrong on either day.

Mr. Vendetto testified that he was involved in a fight with the police on or about December 8, 1992, but that he

is not sure of the date. He stated that he was not hit in the back of the head with a police flashlight during this incident, nor was he held in a headlock by a police officer. He does not believe that he had bruises and cuts on his face when he returned to the rig. He said that after the accident on the ship he was stabbed in the face and required one-hundred-two stitches. This was in April of 1994. A surveillance tape was shown, and Mr. Vendetto admitted that he was the person on the video. He basically said that he was able to do the things shown on the video because most of the activities involved were not ones where he had to apply any pressure with his hand, or if he did, that he just had to work through the pain. He also states that he has good and bad days and that he can do more on the good days.

The plaintiff testified that his superiors had seen him lower things before in the same manner that he used during this particular SAM in which he was injured. He also said that nobody had explained the wraps to him, but that he had seen them used in the past. He stated that as far as he knew there was no safety manual or company policy that explained the wraps and when they should be used.

Mr. Kubelka, an expert on drilling rig operations and safety, testified that he had been told, and was surprised to learn, that no four point plan or pre-tour meeting discussing safe lifting techniques had been initiated prior to beginning the SAM. He said that he spoke to Mr. Brokaw and Mr. Kelly and that they advised him that they had not covered the method of lowering and lifting the necessary tools before they started this particular 6,000 hour SAM. Mr. Kubelka further testified that those two men also placed the point where the tools were normally lowered for the SAM on T2

in the same place that Joseph Vendetto testified that he had lowered them. Also, he was told that Sonat had used mechanical means in the past and abandoned them because they were losing too many tools. Mr. Kubelka did not believe that this was not sufficient reason to abandon the mechanical assistance because it was designed to avoid personal injury while lowering tools, not to save tools. He added that the wrap around is not considered a good idea for this job. The witness testified that there are alternate means of lifting and lowering that could have been utilized which puts less strain on the back. Also, Mr. Kubelka said that he had reviewed the plaintiff's evaluation, which said that he was coming along real good on the job, but that the plaintiff was still in training and needed to be supervised. Mr. Kubelka testified that he does not feel that there was adequate supervision of the plaintiff during the SAM in which Mr. Vendetto was injured.

On cross examination, Mr. Kubelka agreed that there is a way to lower tools safely that is not mechanical and does avoid any stress to the back. He stated that, "there are times when the rope can be used effectively without being negligent."

Mrs. Elizabeth Vendetto, Joseph Vendetto's mother, testified that her son has a learning disability, more specifically dyslexia. Joe had to struggle through school. According to his mother, he tried hard, but he could not "get" reading or comprehension. However, Joe was very good with motors and anything mechanical. She stated that Joe did not finish high school.

According to Mrs. Vendetto, Joe loved working at Sonat and he loved the work he was doing. He hoped to move up

and become a supervisor. She said that Joe's work at Sonat and the fact that he was doing well gve him new-found self esteem.

She testified that Joe was involved in an incident with law enforcement in December of 1992. She said she saw him the next night and that all he had as a result of the incident was a cut on his forehead. He did not seek medical treatment after the incident with the police, he did not complain of any pain or complications, and he returned to work when he was scheduled to return.

Mrs. Vendetto testified that Joe came to stay with her at her house on the day he was sent in from the ship to seek treatment. She knew that he was hurting from his shoulder and that he was in pain. She said that when she questioned her son as to how he was injured, he told her that he was leaning over when it happened. Mrs. Vendetto said that Joe stayed with her for two weeks resting from his injury. She noted that he could relieve the pain by putting his hand up behind his head, and she believed that his shoulder and arm were affected. She spoke with Dr. Aiken about Joe's injury, she saw the MRI, and was very concerned. Mrs. Vendetto stated that she agreed with the doctor that surgery was the best course to follow.

She testified that after the surgery the pain and numbness continued and that Joe was without pain, that some days, were better and some days were worse in terms of the pain. On the bad days, Joe comes to her house and rests, with very little activity. She testified that the rain and weather seem to cause problems for her son. The injury has had a big effect on his life, according to Mrs. Vendetto; he can no longer

ski, his hunting actives are limited, and his activities with his daughter have been curtailed. She said that the accident has wrecked Joe's self-esteem in that he now knows he will always be working for minimum wage. Also, there is no health insurance with his current job.

David Waller testified for the defense. He is an expert on naval architecture and ship design. Mr. Waller's testimony was on the issues of design and unseaworthiness. He testified that there are safety concerns that one considers in the design of a ship. He said that he had examined the thrusters on the *DISCOVERER 534* and talked to workers on board about the exact procedures used to perform the maintenance on the thrusters. The witness said that you do not need mechanical means to perform these tasks nor would he recommend that they be used for this type of job. Mr. Waller did say that a forty-five pound weight would put a strain on a person's back if they were leaning over a rail lifting or lowering that weight.

The mechanical supervisor on the *DISCOVERER 534*, John Kelly, testified that he is the head of the department that Joseph Vendetto worked in at Sonat, that he first found out about the accident the day that Mr. Vendetto left the ship, and that he heard about it from Mr. Gunnels. Mr. Kelly said that on the Friday morning that Mr. Vendetto left the vessel to go and see the doctor, he attended a meeting to discuss what had happened. Besides Mr. Kelly, those present at the meeting were Rick Gunnels, Jody Roher, Robert Newberry, and Joe Vendetto, himself. The witness said that he knew nothing about Joe's accident until this meeting, and that Joe should have come to him first since he was his immediate supervisor. He claimed that at the meeting Joe

said that he was hurt when he was on the A-cap grabbing the chain fall to pull it into the pad eye. He said that there was a four-point plan before beginning the SAM and that Joe attended this meeting. However, he admitted that he did not go over safe lifting techniques to pick up a forty pound chain fall, and that he did not do so because they had weekly safety meetings and a training school that covered such things as safe lifting techniques. He said that Mr. Vendetto went to those meetings and went through the procedures at training. He testified that Eugene Orcutt, who was working with Mr. Vendetto at the time, lowered the chain full down to him. It is also his testimony that the staging came all the way out to the ladder and that it is possible to lower the tools straight down. He also said that there was not enough room to lower the tools where Mr. Vendetto said that he lowered them. Mr. Kelly testified that during the 6000 hour SAM that there was another operation on the rig floor that he was involved in. He stated that Mr. Brokaw did the tying on as Mr. Orcutt lowered the tools, even though Mr. Brokaw testified that he was not there. The witness said that every one had a different way to lower and lift tools. He also said in his deposition that he did not think anyone used the wraps. He said that he had never conducted a safety meeting or training about wrapping a rope around about rail to lower tools. The safety manual at 3.63 subsection 4 requires a written plan, which was not done. The witness said that the written requirement was added after Mr. Vendetto's accident. The Court found this witness' testimony less than credible.

Eugene Orcutt, classified as Mechanic 2 on the Discoverer 534, and in a supervisory position over Mr. Vendetto, testified that there was a safety meeting the morning of the SAM. He claimed that something was drawn

up at the meeting by John Kelly and that he and Joe discussed who would do what. Mr. Orcutt said that he lowered things down to Joe, and that Joe only lifted out some of the oil and that he mostly tied the buckets to be lifted. He stated that at the end of the day he lifted up the chain falls. His testimony was that the scaffolding extended out past the ladder, so that when you stepped off of the ladder you had something to step onto. Mr. Orcutt said that he was Joe's roommate and that he worked with him for the entire SAM and that Joe never told him he was hurt, nor did Joe appear to be hurt. Mr. Orcutt admitted that there was not a written four point plan for the procedure employed at the time of the accident.

Jack Barnidge, an expert in safety of materials handling, testified that it is both safe and acceptable to lower tools manually with a rope some 25 feet even if the weight is up to forty or fifty pounds, as long as it is done in a safe manner. The witness said that he thought that the different on-the-job safety programs installed by Sonat were good in the respect that the workers were trained in many different ways. The witness testified that the pre-SAMS safety meeting was adequate and that it did not have to be written. However, he admits that it is better if it is documented. He stated that it is not necessary that there be a review of safe lifting techniques at every pre-tour safety meeting. He also said that Sonat's lifting procedures are reasonably safe.

On cross, Mr. Barnidge admitted that he did not review any safety manuals or materials while on board the vessel nor was he clear on some of the details concerning his visits to the ship. He was not clear as to where the accident occurred, or where the thruster was located, whether forward or aft. Also, Mr. Barnidge said that he knew from people he

talked to on board that the tools were sometimes lowered without the wrap and guardrail. Little weight was given to the testimony of this expert.

Rick Gunnels, the rig site superintendent, testified that he spoke to Joe Vendetto about his injury for the first time on the morning that Joe left to get his injury checked, and said that Joe told him he was injured when a chain fall was lowered to him and he tried to lock it into the eye patch. The witness said that neither Jody Roher nor John Kelly seemed to know what had happened to Joe, except that he claimed to be hurt. The witness testified that at the time of the meeting he did not have the report of the on-the-job injury prepared by the medic, Jody Roher.

On cross, Mr. Gunnels admitted that he told the onshore supervisor, Mr. Wilson, about Joe's injury and had sent him a report and some information, and that he reported the injury to Mr. Wilson as Joe had written it on the medical report, and not how Joe said he was injured during the meeting. Mr. Gunnels claimed that he verbally told Mr. Wilson of the second story, but that he did send in the written report that Joe helped fill out with the medic. Mr. Gunnels said that Joe had an attitude problem, but admits that Joe was promoted on several occasions.

Dr. David Aiken, Jr., testified by deposition. It was stipulated that Dr. Aiken is an expert in the field of orthopedic surgery. He first saw the plaintiff on January 22, 1993. Mr. Vendetto told him that he had been injured while lifting a heavy chain and he had begun to feel pain in the right side of his mid-back. He said he continued working, but the pain kept getting worse and that it had began to radiate

into his right shoulder. he examined the patient and found that he had tenderness of the rhomboid muscle and some muscle spasm in that area. Also, he noted that he had some decrease in light touch and pin prick over the lateral deltoid area, which is the side of the arm. He felt that Mr. Vendetto may have sprained these muscles and recommended bed rest. He thought that the damage could have been more extensive, but wanted to wait and see. Dr. Aiken testified that Mr. Vendetto appeared like a normal worker who did not want to be injured and who wanted to get over it.

Doctor Aiken say Mr. Vendetto again on February 8th. The plaintiff told him that he was getting worse, with the pain in his back radiating to his right side of his neck and into his right shoulder. Mr. Vendetto complained of a constant numbness in all the fingers of his right hand and right shoulder blade. When Mr. Vendetto told him that the pain could be relieved by holding his right hand behind his head, Dr. Aiken felt that this was a sign of a ruptured disc. Based on the patient's complaints and symptoms, a MRI was ordered; the MRI showed that Mr. Vendetto had a ruptured disc. They discussed treatment and decided on surgery because it was a large disc rupture, and there was encroachment on the nerve roots that were being pushed by the ruptured disc. Dr. Aiken did not see any hope for improvement for Mr. Vendetto without the surgery. Mr. Vendetto did not get a second opinion but instead had his mother, a nurse, come in to speak to the doctor. All agreed that it was reasonable to go ahead with the surgery. Dr. Aiken confirmed that he knew of the ruptured disc three weeks after the accident.

After surgery, Mr. Vendetto told Dr.Aiken that for a time he had complete relief from the pain and weakness in

his right arm, as well as from the soreness in his neck. Then, about three weeks after surgery, when he was using a neck brace, he felt a return of the pain and a numbness in his right upper arm. Dr. Aiken saw him two days later, and he seemed to only have a subjective numbness over the right deltoid muscle. Two weeks later the plaintiff came back still complaining of pain in his arm, although there was no numbness or neurologicial defect that the doctor could observe. Another MRI was done six weeks after surgery and it was normal. The doctor did testify that it is possible to have nerve damage from the disc rupture which is not improved by removing the ruptured disc because the nerve is a very delicate structure and it can be pinched so hard by a disc rupture that it will be permanently damaged even when the disc rupture is removed. So, if the patient is still complaining of soreness, the doctor would have to say it must have been from damage to the nerves causing soreness in the arm.

Mr. Vendetto continued to heal, but when the doctor saw him again on April 21, 1993, he was still complaining of soreness in the arm. The doctor said he would have to wait a few months to let the fusion heal completely.

On May 2nd, 1993, the patient said he felt a bit better, according to Dr. Aiken. However, he was still complaining of some soreness in the neck and upper arm, but he stated that the pain did not go past the elbow. X-rays at that time showed a very solid fusion and the doctor felt that he could resume normal activity, including swimming and sports. Dr. Aiken did not feel that he should be restricted by his physical neck problems. He felt that Mr. Vendetto should try to see what activities he is able to do. When a person has this type of soreness in the arm, and it is from nerve damage that can't

be seen, the doctor said that activities may cause them pain but they are not going to permanently worsen themselves by doing those activities.

Dr. Aiken saw him again on June 17, 1993 and he continued to have a very good solid fusion. Mr. Vendetto told the doctor that he was still having pain in his right shoulder blade and the right upper arm, that the pain would come and go, and that it was about the same as it was before the surgery. Dr. Aiken stated that this would be consistent with some type of nerve damage from the disc rupture. The doctor said that he could not explain the three weeks of relief the plaintiff had after surgery, because if he had nerve damage from the disc rupture, which continued to be damaged after removal, then it would be expected that he would have had constant symptoms throughout that time. However, the plaintiff was taking medicine at that point, which would have masked some of the soreness.

An EMG and a nerve conduction study were performed by a neurologist, Dr. Adams, on July 1, 1993. Both were normal, which just indicates that they were not able to objectively confirm that Mr. Vendetto was still having problems.

The next time Dr. Aiken saw Mr. Vendetto was July 6, 1993. The patient was still complaining of right sided neck pain and right deltoid pain, and said that he was in too much pain to return to work. The doctor felt that from a physical standpoint Mr. Vendetto could try to return to work. He said that Mr. Vendetto told him he was swimming twice a day for physical exercise, one hour at each time duing this period.

Dr. Aiken suggested that the plaintiff get a Functional Capacities Evaluation, which was done on July 29, 1993. The test is basically subjective. The patient relates how he is functionally capable of movement in terms of work in relation to his level of pain complaint. The evaluation showed that he was capable of a medium level of work which is defined by the United States Department of Labor as lifting a maximum of fifty pounds, or frequent carrying of objects up to 25 pounds. While the test is subjective, an occupational therapist also observes the patient. The therapist in this case felt that the plaintiff was not malingering. Both the therapist and the doctor agreed that his abilities would not allow him to return to his employment with Sonat as a thruster mechanic based on a description of what that job entails.

He visited Dr. Aiken again on August 24, 1993. Mr. Vendetto said that he was having a constant soreness in the right side of his neck, with intermittent right arm pain (40 to 50% of the time) and that the pain never went past his elbow. So, there seemed to be slight improvement, in Dr. Aiken's opinion.

Dr. Aiken did not see Mr. Vendetto again until February 2, 1994. At that time, Mr. Vendetto said that he was having a constant stiffness in the neck area and constant numbness over the top of his shoulder. Since there was less complaints than there had been six months before, the doctor felt that the patient had reached maximum medical improvement and that he was capable of medium work. Mr. Vendetto was not working at that time.

The next visit was September 7, 1994. Mr. Vendetto complained that he was having soreness in his right cervical

muscles on the right side of his neck and that a few months before he had numbness of the last three fingers of his right hand. He said they had remained numb. Mr. Vendetto was working as a bug exterminator and Dr. Aiken felt that was a good type of job for him. Mr. Vendetto had a full range of motion of the neck and no muscle spasm in the neck, although he complained of some pain on the right side of his neck. There was no muscle atrophy and there was no complete sensory loss. So, objectively, Dr. aiken thought the patient had a normal examination and felt that he had reached maximum improvement because it was now a year-and-a-half after his surgery, and that this would be as good as he was going to get. Doctor Aiken told him only to come back if it was necessary because the doctor did not think that he could do anything else for Mr. Vendetto.

Mr. Vendetto next saw Dr. Aiken in January 1995. He told the doctor that he had been duck hunting, which caused him to look upwards a lot, and this seemed to have caused a right-sided neck pain which was radiating into his right arm. Mr. Vendetto had been working part time in a fishing store and felt that he had gotten a little better since the pain first occurred, but he was having a good deal of soreness in the right side of his neck and arm. X-rays continued to show a nice solid fusion. A physical examination showed a decrease in light touch and pin prick over the top of his right arm in the forearm and the right hand, but the numbness did not extend into the fingers. His reflexes were normal, although there was some loss of motion in that he could not rotate to the left more than 45 degrees. The doctor felt that Mr. Vendetto should use his neck collar and see if his symptoms did not subside.

On January 26, 1995, Mr. Vendetto came in again and said he was having the same complaints. Another MRI was done on February 1, 1995, which did not show any new disc rupture but did show that there was solid fusion from the old disc rupture.

The last time Dr. Aiken saw Mr. Vendetto was on February 3, 1995, at which time he told the doctor that his neck was feeling better and that he was not having any pain. There was no physical change in his previous condition and Dr. Aiken continued to feel that he had reached maximum medical improvement and that he could perform work at a medium duty level. Dr. Aiken stated that all of the symptoms complained of since the surgery could be related to the original disc herniation and the nerve damage that Mr. Vendetto had in February of 1993. The doctor stated that he believes Mr. Vendetto's permanent condition will remain as it is now with occasional flare-ups of his neck problems. Also, the doctor said that if the history given by the plaintiff was correct, then the herniated disc was caused by his on-the-job injury. The doctor also feels that the plaintiff is only capable of a medium level of work as defined by the Functional Capacity Evaluation.

All of the doctor's bills have been paid by Sonat, and his fee for testifying on this date was $300.

On cross, the doctor testified that he saw the plaintiff for the first time on January 22, 1993 and wrote that "patient was at work lifting the chain falls and hooking them on a thruster" when he was injured. The doctor said that was the history that the plaintiff had giving him. The plaintiff told him that while he was lifting the chain falls, he felt a pain

in his mid back, which the doctor took to mean between his shoulder blades. The plaintiff told the doctor that he continued working. The doctor said that it was possible for Mr. Vendetto to continue working because of the position of the disc. The doctor said that the ligaments will tear first and then the disc will pop out later. The doctor said that there are a lot of different mechanics that can cause a ligament to tear.

The Doctor said that Mr. Vendetto had not told him of any incident involving the Houma police approximately four weeks prior to this where he was allegedly hit about the face and wrestled to the ground. The doctor said that if this had happened, such activity could also start a ligament on the road to deterioration.

The doctor testified that moderate work, as defined by the Department of Labor, say, occasionally lifting up to fifty pounds, involves activity that can cause a disc to rupture, but it is not inherently dangerous to the point that it is going to cause the disc to rupture. A ruptured disc could just be caused by cumulative damage. It was also pointed out that on the Department of Labor characterizes the work of an oilfield equipment mechanic as requiring only medium strength.

After surgery, the Doctor could find no objective findings as to why Mr. Vendetto continued to complain of pain, and the only evidence of pain and areas of numbness are the plaintiff's complaints of such. The doctor said that he should be giving the benefit of doubt that he is having soreness, but even so that people with this type of problem should generally be able to return to medium work. Also around

September 7, 1994, Mr. Vendetto told the doctor that he had been in a fight four months before where he had been stabbed in the face and needed 102 stitches. The doctor was of the opinion that if someone was stabbed in the face, that he would imagine that it would knock the head around. The doctor also said that this was the type of thing that could cause someone with a cervical fusion to have neck and arm pain.

The doctor confirmed that, in his opinion, the patient had reached maximum medical improvement in February of 1994.

On cross, Dr. Aiken said that he had no reason not to believe Mr. Vendetto when he told him of his symptoms, and that Mr. Vendetto seemed to be a credible person when he reported his problems. The doctor also agreed that the residual pain problems will cause more limitations than normal recovery without the pain problems. The doctor said that if the disc would have ruptured in some incident four weeks prior to this on-the-job injury, it would be more likely than not that Mr. Vendetto would have had some pain problems which would probably have affected his ability to perform his job functions for those four weeks. The doctor also said that if a worker is doing several strenuous tasks that put strain on his shoulders and neck over a period of a day or two, that the cumulative tasks could be a possible cause of the tearing of the ligament and the disc herniation.

The second deposition of Dr.Aiken concerns a videotape of the plaintiff, which was filmed on March 21, 1995. Doctor Aiken was asked to compare the plaintiff's movements in the tape and the way he acted at examinations with the doctor in January and February of 1995. He was also asked to verify

if Mr.Vendetto's complaints are verified by his actions in the tape. The doctor said that in the film the plaintiff was easily able to route his neck to 90 degrees on either side, and during the examination he could not rotate to the left more than 45 degrees. The plaintiff had also complained of pain and numbness in his right hand, according to Dr.Aiken. The doctor said that the activities he observed in the video would indicate that the plaintiff did not have a significant problem with his right hand. The doctor said that based on the video, the plaintiff did not demonstrate any impairments with his neck or hands. The doctor added that the way the plaintiff appeared on video was different than the way he carried himself in the office with the doctor.

On rebuttal, Doctor Aiken said that February 3rd of 1995 was the last time that the he saw the plaintiff. He could not tell from the video how much pressure Mr. Vendetto had to apply with his right hand. The doctor did not see Mr. Vendetto after these activities, so he has no idea if he had any physical problems after performing them. Also, the doctor admitted that he did not ask Mr. Vendetto if his inability to fully rotate his neck to the left in the office was permanent or a problem that came and went. The doctor concluded that even though there was no objective bases for the pain, that this is the type of pain that would come and go, or periodically flare up. However, on reexamination, the doctor agreed that the way Mr. Vendetto acted in the film, was consistent with all of his objective findings which were negative.

Charles Brokaw testified by deposition. In his statement, he testified that he is still employed by Sonat and has been with them over five years. He worked that entire time

on the *DISCOVERER 534*. Prior to working for Sonat, he worked with another company for eleven years on drill vessels. On those ships and on the *DISCOVERER 534* he worked as a Mechanic I. His yearly salary is approximately $44,000.00. He has received two increases in salary since he started at Sonat. As Mechanic I, he is the motor room supervisor, and in the absence of his supervisor, he is the immediate supervisor of the ship. His immediate supervisor, is John Kelly, who is the mechanic supervisor. Mr. Brokaw testified he is in charge of the Mechanic II, the thruster mechanic or Mechanic III, and all the motormen. There is only one motor room on the vessel, and it is located aft of the ship and directly over the aft thruster well. The majority of his duties call for him to be on deck and his duties cover every mechanical function on the ship. Mr. Brokaw said that there is no set schedule for promotions, a lot of variables are invoved. He does believe that there are going to be opportunities for promotion over the next several years at Sonat. A Mechanic III would learn, through the process of training and supervising, what is needed to eventually work his way up to Mechanic I. Mr. Brokaw said that he has worked on numerous 6,000 hour SAMs since he has been with Sonat, but now he rarely has to fiddle around with them because they have trained people over the years on how to do them. Usually six SAMs are done a year.

Mr. Brokaw testified that he worked with Mr. Vendetto for about two years, maybe less, but that they worked together until Mr. Vendetto's injury. He worked with Mr. Vendetto when Mr. Vendetto was the senior motor man and also when he was Mechanic III. Mr. Brokaw said that Mr. Vendetto did not do a very good job because he was insubordinate. He said it was not a personality conflict, but that

Mr. Vendetto would get under your skin pretty good when it came to doing the job. Mr. Brokaw believed that the 6000 hour SAM that the plaintiff was injured in was his first as a Mechanic III and he did not recall if he had personally worked with him before on any other SAMs. He said that on the date of the SAM during which the plaintiff was injured, that there was a meeting before the workers actually physically started doing it. He said that John Kelly would have been the supervisor who would have conducted it. He could not remember what other mechanic or motormen may have been at the meeting. he just said that certainly Mr. Kelly and Mr. Vendetto were there, and that Eugene Orcutt might have been there as Mechanic II. He said that at the meeting they discussed how and where they were going to hang the chain falls and the procedure you go through to get the lockout permit. They just talked about the normal procedures that they were going to do. He says that he does not remember if they discussed who was going to do what. After the meeting they initiated the plan, but Mr. Brokaw was not involved in starting the SAM. He said that they usually begin SAMs first thing in the morning. His first involvement would have been after the thruster was lifted and he would have checked the readings. Mr. Brokaw said that all the oil was supposed to be pumped out of the inside of the thruster at this point, but that not all the oil got pumped out. Mr. Vendetto was responsible for that procedure on this particular SAM. The witness said a lot of oil was left in the thruster and that he personally removed about 21 or 22 five-gallon buckets before he got irritated with Joe and made him carry the buckets. Mr. Brokaw felt that Mr. Vendetto should do this because he was the one who had said that all the oil had been pumped out. The witness said that at this point the scaffolding had been set up, but he did not know whether the chain falls

had been lowered. He claimed that at this time Mr. Vendetto was down in the thruster and that Mr. Orcutt was up there with him, but he did not sound certain of this. That was all that happened the first day, according to Mr. Brokaw. The witness could not remember what day they started, but a SAM will take 36 to 48 hours to finish, and it is usually closer to 48.

The witness testified that on the second day they replaced the A shaft seals which are in the inside of the thruster. He testified that Eugene Orcutt and Mr. Vendetto did the A shaft work. Mr. Brokaw was there for a while but he said that he really was not needed at this point. Mr. Vendetto and Eugene Orcutt got everything ready by taking it apart and cleaning everything up so that it would all be ready to install the new seals. The witness said he installed the seals and Mr. Vendetto watched. Mr. Brokaw testified that he was inside the tunnel where the A cap is, but outside the thruster. While all this was going on, Mr. Brokaw was also involved in another project on the rig floor. He left the thruster after the seals were put in. The only thing left to do was service the thruster and to check to see if any repairs had to be done. During this period the witness has no knowledge as to who did what tasks or how the tasks were done. Nor does he have any recollection of who lowered what tools down. He said that you just use regular rope to lower the tools and that you just let the rope out over the handrail until it gets to the point where the person in the tunnel, who you cannot see, can reach out and grab it. The witness said that the person inside does not have to grab very far to get it, that it is like reaching out of a window. Mr. Brokaw said that you pull it up in the same manner that you let it down. The witness said that a hand over hand method is used.

He said he did not recall if there was a certain way of doing it or if there were any requirements, nor does he recall if there was any discussion on how it should be done before the SAM.

The witness said he found out that Mr. Vendetto was injured when he saw him walking to the helicopter and that John Kelly told him where Mr. Vendetto was going. Mr. Brokaw said that Mr. Kelly told him that Mr. Vendetto said that he had hurt himself with the chain falls, that he was lifting them over to hook them in the pad eyes of the shackles and that in doing so he hurt himself. Mr. Vendetto never personally told Mr. Brokaw how he had been hurt. Mr. Brokaw said that earlier that shift, Mr. Vendetto had told him that he had been involved in a fight with the Houma police. Mr. Vendetto had told him he got hit on the back of the neck with a Maglight. This was said to him before the 6000 hour SAM. Mr. Vendetto never told Mr. Brokaw that he was having any problems due to the incident with the police, nor did the witness notice anything wrong with the plaintiff after the incident. He said that he later heard other versions about how, Mr. Vendetto got hurt. The witness saw Mr. Vendetto once after he left the vessel and he had a neck brace on, but they did not discuss his injury.

On cross, Mr. Brokaw said that he had never picked up or lowered anything that was heavy enough in his opinion to require a safety wrap. He also said that the workers would regularly lower things on the Thruster 2 right by the ladder.

On re-examination, the witness said that he had never felt the need to use a safety wrap. He added that he had never shown anyone underneath him how to do it, because by the

time they work their way up to the engine room they should already know how to pick things up.

Judy Roher testified by deposition. She stated that she is no longer working for Sonat, that she had worked for Sonat for a little over four years, and when she left she was the rig safety training technician and medic. She was promoted to that position in December of 1992, and before that she was a dispatcher. Throughout her employment with Sonat she worked on the *DISCOVERER 534*. For her training as a safety technician she went to a number of safety schools and worked with the other safety technician learning the tricks of the trade. Also, when she was laid off, she went to school and got her Emergency Medical Training certificate. She was certified in August of 1992. As a safety training technician, her duties were to walk around the rig to watch and check to see if any of the workers were working in an unsafe manner. She also inspected equipment to make sure that it was in good condition and not defective. Ms. Roher would also teach classes for the workers on safety for the different parts of the rig. Her duties as a medic were mostly just as needed, colds and stuff, but she did keep a log and she documented any reports she received in the log.

Joseph Vendetto was one of the first people she met on board. From that time until his injury, Ms. Roher did not know of any physical problems or limitations that caused him any difficulties in performing his tasks. Mr. Vendetto never came to her with any injuries, but she did say that he liked to be babied. She did not know of any prior neck problems that he had before his accident in January of 1993. Ms.Roher said that she was not in a position to make any comments on Mr. Vendetto's abilities as a worker. She did not know

or remember what the safety record was like for the *DISCOVERER 534* while she was there.

Ms. Roher testified that she first learned of Mr. Vendetto's injury on a Wednesday night, she believes the date was the 20th. She said that he came to see her and told her that he was having a problem with his neck. Mr. Vendetto told her that he thought he might have hurt it when he was working, but that it might also be a stiff neck from sleeping. She said that she told him that they would have to do a report on it for the Monthly Rig Treatment Log. Ms. Roher said that it appeared that Mr. Vendetto did not want to report it because he did not think it was anything, really, that he had just wanted to come tell her about it and have her rub some ointment on his neck. Mr. Roher said that she did not make a log of the visit that night because Mr. Vendetto talked her out of filing a report. She did fill in the report on the next night, the 21st, because Mr. Vendetto came back that night and she realized that she really should have reported it the night before. On the 21st, the witness said that Mr. Vendetto also complained of the neck pains, but said that he was also having the pain in his shoulder and arm. Ms. Roher said that when she told Mr. Vendetto she was reporting this, he again asked her not to. Ms. Roher testified that she told Mr. Vendetto that she was going to report it and that he was to leave in the morning on the helicopter so that a doctor could look at his injury. She also had Mr. Vendetto fill out a statement on the 21st, which he wrote out, and then she typed it up. She testified that Mr. Vendetto had told her what had happened at work the night before, but on the 21st he wrote it down. She said the only difference between his stories is that the night before, on the 20th, he talked about lifting tools and that night, the 21st, he was talking about

lowering tools. However, this was never written down since she did not fill out a report that first night. The wirness said that Mr. Vendetto mentioned chain falls the day after, which was the 21st. She said that she did not talk to him the second night when he wrote down what had happened because it has to be in his own words. The witness said that Mr. Vendetto told her that he had not told anyone that he was injured. She also said that he did not tell her about any numbness until the second night. Ms. Roher testified that on the morning that Mr. Vendetto left to go see the doctor that she did not attend a meeting with Mr. Vendetto, John Kelly and Rick Gunnels concerning this accident, but she said she knew that Mr. Vendetto went to a meeting with the other two men before he flew out. Ms. Roher said that while Mr. Vendetto was writing the report, she went out and told Rick Gunnels what was going on. She placed the report, which contained Mr. Vendetto's account of the accident, on Rick Gunnels' desk. She said that she got the report back the next morning with Joe Gunnels signature on it, but she was not there when he signed it. She testified that she does not know if it was before or after the meeting. She said that after the meeting she talked to Rick Gunnels and he told her that the story that Mr. Vendetto had told them in the meeting was a little different from the one that Vendetto had written down. She said that she and Mr. Gunnels did not discuss it any further and that Mr. Gunnels did not say how it was different nor did he ask Mr. Vendetto to fill out another report with the different version.

Ms. Roher testified that a report was also sent by Rick Gunnels to Jack Wilson, the land based rig supervisor. She said that she filled out this report for Mr. Wilson right after she typed the other one. Both reports were placed on

Mr. Gunnels' desk at that same time for him to review according to the witness. She assumes that he would have read the reports before he met with Mr. Vendetto, based on common practice. Mr. Gunnels did not ask Ms. Roher to change anything on the report to Mr. Wilson, and she testified that she was never asked to change anything on these reports. The witness said that if a supervisor wanted to add anything to a report, he would usually just add it; however, she never saw anything added on to her original report on the Vendetto case. She testified she also filled out a Rig Safety Training Technician Statement, which would be her statement of what she saw and heard from the injured or ailing person. However, Ms. Roher said that what she wrote was not an accurate reflection of what happened that Wednesday night, because she wrote in it that Joe complained about his back and numbness in his right arm on Wednesday and that did not actually happen until Thursday night. She said that she later realized her mistake, but said that she is not allowed to make changes on these reports because they are legal documents. Ms. Roher said that immediately after the meeting, no one who had attended told her what had allegedly been said in the meeting concerning Mr. Vendetto's injury. She claims, however, that on the next hitch Chuck Brokaw and John Kelly, who were both at the meeting, talked to her and said that they wanted to know if Mr. Vendetto had told her if he had told anyone that he was hurt. She said that she told them no, that Joe had told her that he had not said anything to anyone about being hurt. The witness said that this was the only thing that they had talked about concerning Mr. Vendetto's injury.

Ms. Roher testified that she then looked at a diagram used at the pre-tour safety meeting and she explained what it was used for. She said that they did not start using the Four Point Plan until after Joe Vendetto's injury. She stated

that safety was stressed and that the pre-tour safety plan would be detailed to the extent necessary for the job. She said that the workers were told repeatedly that if they were injured to report it right away. The witness said that the process of lowering and raising tools and chain falls for the 6000 hour SAM for a distance of thirty feet was something that should have been discussed in the pre-tour safety meeting, and that this was her opinion as the rig safety technician. She said that she was not involved in this pre-tour safety meeting and that she does not know if the other safety technician was involved.

Ms. Roher testified that she talked to Joe after he left the rig. He would call her a lot, and sometimes when she did not hear from him. she would call to see how he was doing. She said that he never took the injury seriously, but that he did say he was having neck surgery.

The witness also said that she never discussed with Eugene Orcutt, Charles Brokaw or John Kelly who was during what tasks during the 6000 hour SAM when Mr. Vendetto was injured.

On cross, the witness said that the safe lifting of materials was discussed from time to time at different safety meetings. She said that there were classes on back safety and proper lifting techniques and such, and that the employees were giving certificates when they completed the courses. The witness testified that there was also a video tape shown that Mr. Vendetto was required to go to. She said that at every pre-tour meeting she attended safe lifting techniques were always discussed. The witness further states that

if they failed to discuss safe lifting techniques it would be "a screw up" in her opinion as a rig safety technician.

Ms. Roher testified that if she put the next day's date on one of the reports, that would be due to the fact that she typed it after midnight the night before, not that it was done the next night. She also said that it is a policy that you only include in the typed report exactly what was on the hand-writing one.

ECONOMIC LOSS

Dr. Randolph Rice, an expert in the field of economics, issued a report in this case on March 3, 1995. The attorneys stipulated the report into the record, except for a small part of the report. This deposition concerns problems that arose during the trial concerning the report.

The first problem arose in the estimated value of meals that were provided to Mr. Vendetto on the job. Dr. Rice gave these meals a per diem value of $12.50. Using the 14-on/14-off work schedule the annual equivalent would be $2,281.25. So, the value of meals from January 19, 1993 to March 27, 1995 is $4,981.00 and that for the 26.38 years of future work expectancy, the future value based on this amount is $48,176.00 (Total=$53,157.00). The amount of $12.50 was reached when Dr. Rice looked at figures provided from representatives of companies who provide food, or caterers. Those figures ranged from $20.00 to $25.00 to $30.00 per day. He compared those figures to studies done by the U.S. Government for food at home, and the rate is $8.00 to $9.00 to $10.00 if you eat food

only at home. As a sense of precaution, the doctor said that he tended toward the low side of the range and set the value at $12.50.

Dr. Rice said that he had been preparing these types of reports for approximately fifteen to seventeen years.

On cross, the doctor agreed that if there was proof that the plaintiff was working and there was evidence of advancement, then those amounts would have to be credited from that amount in his report concerning future wages.

A summary of Dr. Rice's economic report follows.

Based on a recent study by the Bureau of Labor Statistics (1986), Mr. Vendetto's future work-life expectancy is 26.38 years. Based on information given to Dr. Rice about the plaintiff's past salaries and his chances of promotion over a period of time, Dr. Rice developed the following amounts in regard to past and future wages:

Past wages =	$60,070.00 After taxes
Future Wages =	$752,772.00 After taxes
Total Wages =	$812,842.00

From that total work done at a lesser rate can be deducted from this amount. For example, if he works for minimum wage for the next 26.38 years, $181,609.00 should be deducted from the total, leaving his loss at an overall value of $631,233.00.

Fringe Benefits received by Mr. Vendetto while employed with Sonat:

"Matching" savings plan:	44,899.00 value
On-the-job meals at $12.50 per diem value.:	$53,157.00 value
Insurance for Life, Health and AD&D:	$ 8,479.00 value

ANALYSIS OF THE LAW AND FACTS

Mr. Vendetto argues that Sonat is liable based on two separate theories of recovery—Jones Act Negligence and unseaworthiness. Jones Act Negligence and Unseaworthiness are two separate and distinct claims. The finding of negligence does not lead to a finding of unseaworthiness—"Individual acts of negligence do not necessarily create the condition of unseaworthiness. *Alverez v. J. Ray McDermott & Co. Inc.*, 674 F.2d 1037, 1041 (5th Cir. 1982). In a Jones Act claim it is the conduct of the defendant which is at issue; in a claim for unseaworthiness it is the defective condition which must be examined. *Caravalho v. Dual Drilling Services, Inc.* 631 So.2d 725, 729 (La.App.3 Cir. 1994).

"Under the Jones Act, a vessel owner is deemed negligent if he fails to exercise reasonable care to maintain a reasonably safe work environment. *"Ober v. Penrod Drilling Co.* 694 F.2d 68, 70 (5th Cir. 1982), modified on other grounds, 726 F.2d 1035, 1037 (5th Cir. 1984). Consistent with the Federal Employers Liability Act (FELA), the Jones Act employer is liable for the negligence of any of its "officers, agents, or employees." 46 U.S.C. Section 688, 45 U.S.C. Section 51. The standard of care in Jones Act cases is

"negligence" which is properly defined as follows:

> Negligence is the failure to exercise the care which an ordinary prudent person would use under the circumstances in discharging the duty that he owes to those who work on a vessel. The shipowner has a continuing duty to provide a reasonably safe condition. Thomas Schoenbaum, *Admiralty and Maritime Law,* 2nd ed., West Publishing, St. Paul(1994)

This duty is not absulute, however; it is a duty to take reasonable care under the circumstances. 694 F.2d 68, at 70. Therefore, the mere fact that an injury has occurred does not trigger liability under the Jones Act. An injured seaman must produce evidence that his injury was the result of negligence by the shipowner, his employees, or agents. *Marvin v. Central Gulf Lines, Inc.*, 554 F.2d 1295, 1299 (5th Cir. 1977). The standard of causation in a Jones Act case is clear: the plaintiff may recover, if under the facts, the negligence of the defendant played any part, even the slightest, in producing the injury for which damages are sought. *Brister v. A.W.I., Inc.* 946 F.2d 350, 354 (5th Cir. 1991); *Ferguson v. Moore-McCormack Lines, Inc.* 352 U.S. 521, 523 (1957), citing *Rogers v. Missouri Pacific R.Co.* 352 U.S. 559 (1957). Thus, "the burden on the plaintiff to prove proximate cause in allegations based on the Jones Act and general maritime law is very light." *Landry v. Two R. Drilling Co.* 511 F.2d 138, 142 (5th Cir. 1984).

The court finds that the plaintiff has met the burden of proof placed on him by law. The defendant was negligent in his duty to provide a reasonably safe workplace to those

who worked for him. This negligence stems from his duty to ensure that all workers were instructed in and that they were actually using the proper procedures when lifting and lowering tools. Sonat is liable because the supervisors on board the DISCOVERER 534 were not making sure that proper safety methods were being used on the rig. It is clear that Vendello was not properly trianed in the safe method of lowering and lifting tools. His testimony reflects not only that point, but that he followed the examples of his supervisors who never corrected him, or showed him a safe way to perform his duties. Mr. Vendetto testified that he did not recall his supervisors discussing lifting techniques before they began the 6000 hour SAM. He testified that he learned how to do things from watching others perform the SAM as he assisted the supervisors. He lowered the tools in a manner that he had seen his fellow workers and supervisors use. The plaintiff said that on this particular SAM everything he did was done in the same manner as he had done it before with his supervisors observing his actions. The plaintiff also said that while he knew the wrap was a safe way to lower tools, they were usually only use for really heavy objects, and that furthermore, nobody had really explained the wrap to him. Vendetto's testimony makes it clear that he was not properly trained or supervised on the safe way to lower and lift tools.

Sonat argues that mechanical means were not necessary and that there are safe means of manually lowering and lifting tools. The Court agrees with Sonat that there are safe manual ways to lower and lift tools, however, it is clear that the safe methods were not explained to the plaintiff and that the supervisors did not correct him when they saw him proceeding improperly. In fact, the testimony of Vendetto's supervisors makes it clear that no method in

particular was utilized on board the *DISCOVERER 534,* and that the wrap method which the defendant keeps alluding to as the proper and safe method was rarely used by anyone on board in lowering and lifting tools. For example, Mr. Kelly, a supervisor, said that everyone had a different way of lifting and lowering tools, and at his deposition he said that he did not think that anyone used the wrap method. He also admitted that he had never conducted a safety meeting or training about the use of the wrap to lower tools. Mr. Brokaw, another of the plaintiff's supervisors, said that in the process of lowering tools he did not recall if there was a certain way of doing it except that it was hand over hand, nor does he remember if there was any discussion of how the tools should be lowered prior to the SAM. This witness also said that he personally had never picked up or lowered anything that was heavy enough, in his opinion, to require a safety wrap. He added that he had never shown anyone underneath him how to do a wrap. Even the defendant's safety expert, Mr. Barnidge, said that people on board the rig told them that tools were sometimes lowered with out the use of the wrap and guardrail.

"Because an employer is liable for the negligence of his employees under the Jones Act, the Jones Act generally provides a broad basis for liability." 946 F.2d 350, at 354.

"By comparison, the seaman's duty to protect himself...is slight. His duty is to do the work assigned, not to find the safest method of work. This is especially true when his supervisor...knows the working method used by the seaman and does nothing about it." *Spinks v. Chevron Oil Company,* 507 F.2d 216, 223 (1975).

It is clear that Mr. Vendetto was only doing his job as he had been told to do and as he had seen others do it. Furthermore, the Court finds that Sonat was negligent, not only in its failure to provide a safe work place by not ensuring that proper safety methods were being enforced by the supervisors on board, but that it was also negligent in its failure to make sure the crew members were properly supervised. Mr. Kubelka said that he had reviewed the plaintiff's last evaluation before he was injured, and that it said that the plaintiff was still in training and needed to be supervised. However, it is clear that nobody really explained to him the proper methods of lifting or lowering tools and that during the SAM he was not properly supervised as someone in training should be. It is clear from the witness that at no point in the pre-tour safety meeting were the proper methods to be used in lifting and lowering discussed. Mr. Kelly, the supervisor, also testified that during this SAM he was also involved in another operation on the rig floor, so that he was not always present during the SAM to ensure that things were done the right way. Both Mr. Kubelka, a safety expert, and Jody Roher, the rig safety training technician and medic, expressed surprise that the proper methods were not discussed before this SAM. Ms. Roher testified that in her opinion as rig safety technician, the process which was to be used in raising and lowering the chain falls over a distance should have been discussed at the pre-tour safety meeting. She was not present at this meeting, but said that at every pre-tour meeting she attended they always discussed safe lifting techniques, and failure to do so would be "a screw up" in her opinion.

The second question that now concerns the Court is whether the *DISCOVERER 534* was unseaworthy. The issue is whether the failure of Sonat to make sure that proper

safety methods were being followed on board the rig and its failure to guarantee that the crew was properly supervised, created a defective condition which would render the *DISCOVERER 534* unseaworthy. The Supreme Court found that unseaworthiness could be a ground for recovery in personal injury cases in *The Oscola*. The Court said that the vessel and her owner are liable "for injuries received by seamen in consequences of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." 189 U.S. 158, 175 (1903). The duty of seaworthiness is absolute and independent of the duty to exercise reasonable care under the Jones Act, but the mere fact that there is an accident is not enough for a finding of seaworthiness. The standard is not to provide an accident-free ship, rather the test to determine if there was an unseaworthy condition in *whether the vessel, equipment or appurtenances were "reasonably fit for their intended use."* [emphasis added) *Mitchell v. Trawler Racer Inc.*, 362 U.S. 539, 550 (1960).

The warranty of seaworthiness also extends to the vessel's personnel. *Boudoin v. Lykes Brothers Steamship Co.*, 348 U.S. 336, 339 (1954). The warranty of seaworthiness includes a seaworthy crew and the ship owner's duty is breached by providing a "defective" or inadequate crew *Comeaux v. T.L. James & Co.*, 666 F.2d 294, 299 (5th Cir. 1983). This court finds that Sonat's failure to ensure that the supervisors on board the rig were following and enforcing the proper safety methods, was a condition that made the vessel unseaworthy. If a crew is not properly trained in learning how to do their jobs safely, then there is no doubt that it is a "defective or inadequate crew." When a vessel's personnel does not know how to perform their jobs in a safe manner, then it cannot be said that the vessel is reasonably fit for its intended use.

The standard of causation is more demanding in unseaworthiness claims as opposed to negligence claims and requires proof of proximate causation. *Brister v. A.W.I. Inc.*, 946 F.2d 350, 354 (5th Cir. 1991). Causation in unseaworthiness requires a showing of proximate cause which means that (1) the unseaworthiness played a substantial part in bringing about or actually causing the injury and that (2) the injury was either a direct result or a reasonably probable consequence of the unseaworthiness. *Alverez v. J. Ray McDermott & Co. Inc.*, 674 F.2d 1037, 1042-3, see also footnote 3 (5th Cir. 1982). This court finds that the failure to properly train Joseph Vendetto on how to safely lift and lower tools played a substantial part in bringing about or causing his injury and that the injury was a direct result of the vessel's unseaworthiness, i.e. its improperly trained and supervised crew.

The Court finds that the plaintiff is entitled to the following award: In General Damages, the sum of THREE HUNDRED THOUSAND ($300,000) DOLLARS; Economic Damages, the sum of SEVEN HUNDRED FORTY-EIGHT THOUSAND, SEVEN HUNDRED SIXTY-EIGHT ($748,768) DOLLARS, for a total amount of damages of ONE MILLION, FORTY-EIGHT THOUSAND, SEVEN HUNDRED SIXTY-EIGHT ($1,048,768), DOLLARS, plus interest, from the date of judicial demand.

The economic damages can be broken down as follows:		
Past wages =$60,070 (after taxes)	$	60,070
Future wages=$752,772 (after taxes)		+ 752,772
	$	812,842

Deduction for minimum wage job that the plaintiff is capable of doing	$	- 181,609
Total Economic Damages	$	631,233

Benefits available to the plaintiff when he was employed by Sonat:		
"Matching" Savings Plan	$	44,899
On-the-Job Meals		53,157
Life, Health & AD&D Insurance		8,479
Total Benefits	$	116,535
Economic Damages	$	631,233
Employee Benefits	$	116,535
Grand Total	$	747,768

All costs of these proceedings are to be paid by the defendant, Sonat Offshore Drilling Company.

Let a formal judgment consistent with these views be prepared by the attorney for the plaintiff, then submitted to the defense attorney for approval "as to form," and then presented to the undersigned Judge for signature.

Officially in Chambers at Franklin, St. Mary Parish, Louisiana, this 16th day of November, 1995.

/s/ William D. Hunter
William D. Hunter, Judge
Division D

Clerks Office
Nov 22 1995

Received and Filed
Nov 16 1995

APPENDIX 2

Joseph VENDETTO

v.

SONAT OFFSHORE DRILLING CO.
No. 96 CA 0626.

Court of Appeal of Louisiana,
First Circuit.

Sept. 23, 1997.
Rehearing Denied Nov. 12, 1997.

Seaman who suffered neck injury while lowering chain fall during maintenance procedure aboard vessel brought suit for damages against vessel owner, under theories of Jones Act negligence and unseaworthiness. The Sixteenth Judicial District Court, Parish of St. Mary, No. 93,675, William D. Hunter, J., determined that owner was negligent and that vessel was unseaworthy, awarding damages of $1,048,768.00. Owner appealed. The Court of Appeal, Gonzales, J., held that: (1) testimony of safety expert that there were mechanical methods that seaman could have used to lower chain fall, and that manual method chosen put stress on his back, was insufficient to establish Jones Act negligence under *Gautreaux* standard of care, and (2) trial court committed manifest error in finding that his lack of training made vessel unseaworthy.

Reversed.

Carter, J., dissented and assigned reasons.

Fogg, J., dissented for reasons assigned by Carter, J.

Carter, J., dissented and would grant rehearing.

Fogg, J. would grant rehearing.

Timothy Falcon, Marrero, for Plaintiff/Appellant # 2, Joseph Vendetto.

Timothy W. Cerniglia, James H. Colvin, Jr., New Orleans, H. Alston Johnson, III, Baton Rouge, for Defendant/Appellant # 1, Sonat Offshore Drilling Co.

Before CARTER, FOIL, GONZALES, FOGG and PARRO, JJ.

GONZALES, Judge.

This appeal arises out of a suit for damages under the Jones Act and general maritime law.

FACTS

Plaintiff Joseph Vendetto, was employed as a seaman aboard the M/V DISCOVERER 534, which was owned and operated by defendant Sonat Offshore Drilling Co. (Sonat). On or about January 19, 1993, Mr. Vendetto was assisting with a routine maintenance procedure on an engine in a thruster aboard the DISCOVERER 534 when he suffered a neck injury.

On January 10, 1994, Mr. Vendetto filed the instant

suit for damages against Sonat, setting forth two theories of recovery, namely Jones Act negligence and unseaworthiness of the DISCOVERER 534, and seeking general damages, lost wages and other special damages, and maintenance and cure. Sonat answered Mr. Vendetto's petition, generally denying the allegations and alleging that Mr. Vendetto was comparatively negligent.

After a trial on the merits, the trial judge determined that Sonat was negligent and that the DISCOVERER 584 was unseaworthy. The trial court awarded Mr. Vendetto damages of $1,048,768.00, which represented general damages of $300,000.00 and special damages in the amount of $748,768.00, together with legal interest from date of judicial demand.

From the adverse judgment, Sonat appeals, assigning the following errors.[1]

1. The trial court erred in its implicit finding of fact that the plaintiff was injured while lowering a chain fall.
2. The trial court erred in concluding that there was negligence under the Jones Act.
3. The trial court erred in concluding that the vessel was unseaworthy.
4. The trial court erred in failing to allocate any fault to the plaintiff.
5. The trial court erred in permitting Robert Kubelka to give expert testimony on the safe manner of performing this task assigned to the plaintiff.

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[1] Although the opinion does not address each assignment of error individually, the opinion adequately disposes of the issues raised.

s6. The trial court erred in awarding $1,048,768.00 in damages, improperly assessed pre-judgment interest on that sum, and failed to give defendant credit for certain benefits and advances to plaintiff.

Mr. Vendetto also filed a motion and order for devolutive appeal in which he challenged the failure of the trial court to award interest from the date of the accident. The issue was not briefed and, therefore, is considered abandoned. Uniform Rules, Louisiana Courts of Appeal, Rule 2-12.4.

STANDARD OF REVIEW

[1] The standard of review in Jones Act and general maritime cases is governed by state law. *See Jordan v. intercontinental Bulktank Corp.*, 621 So.2d 1141, 1155 (La. App. 1st Cir.), *writs denied*, 623 So.2d 1335, 1336 (La.1993), *cert. denied*, 510 U.S. 1094, 114 S.Ct. 926, 127 L.Ed.2d 219 (1994).

JONES ACT NEGLIGENCE

There was some dispute as to how the accident occurred. Mr. Vendetto said that he injured himself as he was lowering a chain fall (weighing between thirty and forty pounds) during the course of a 6000-hour SAM—Sonat automated maintenance, a routine maintenance procedure which was performed at every 6000 hours of operation.

This case is very similar to *Rogers v. Eagle Offshore Drilling Services, Inc.*, 770 F.2d 549 (5th Cir. 1985) (per curiam). In *Rogers*, the plaintiff was pulling a steel drilling

cable off of the drawworks drum. The court held in *Rogers:*

> We reiterated the Court's previous holdings that the failure to use an available method to accomplishing the same work does not render a given method of performing the work unsafe.

770 F.2d at 550. In *Rogers*, the plaintiff's safety expert testified:

> There is a principle in safety, first that you always use mechanical means to do a manual task if you can possibly do it. And there were mechanical means available to do this job. Therefore, I feel that the practice that they were utilizing was unsafe for this reason, because they were not using a mechanical means.

770 F.2d at 550. Nonetheless, the fifth circuit held:

> The testimony of [the safety expert] establishes only that a mechanical means of "cutting and slipping" would have been a preferable method. There was no testimony that performing the work manually was, in itself, an unsafe way of performing the job. We therefore hold to our conclusion that there is no evidence that the use of a manual method ... was unsafe; the testimony the petitioner emphasizes established only that there were probable *safer* methods.

770 F.2d at 550-51.

The trial court in the instant case found the following facts:

> On cross-examination Mr. Vendetto testified that the scaffolding did not extend completely from below the ladder to the edge of the thruster tunnel and that he had to stretch to get across. He admitted that there is a place on the handrail where one can lower the tools without having to worry about obstructions, and that he had lowered tools from that point before. He testified that he had seen and used wraps, but that they were not normally used to lower tools. He admitted that he had sometimes used wraps when lowering tools for a SAM. The witness also said that if a wrap is used, then you can control the load and there is no load on the person lowering the tools. He added, though, that wraps were usually used to hold really heavy things in place. The witness said that he knew that using a wrap was a safe way to lower the tools.
>
> Mr. Vendetto testified that Sonat had self-lifting tapes and safety meetings and placards set out around the rig on safe lifting techniques. The plaintiff said that he saw the placards and that they said to lift with the legs and keep the back straight. He said that was the technique that they had been taught and which he used. They had safety meetings once a week, which he attended, and placards also set out around the rig showing the proper lifting technique.

In rendering judgment in favor of Mr. Vendetto, the trial court relied upon *Spinks v. Chevron Oil Company*, 507 F.2d 216, 223 (5th Cir.1975), citing it for the position that "[t]he seaman's duty to protect himself . . . is slight. His duty is to

do the work assigned, not to find the safest method of work. This is especially true when his supervisor .. . knows the working method used by the seaman and does nothing about it."

With respect to the nature of the duty imposed on a seaman, *Spinks* was recently overruled by *Gautreauz v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir.1997). The *Gautreaux* court found:

> A seaman, then, is obligated under the Jones Act to act with ordinary prudence under the circumstances. The circumstances of a seaman's employment include not only his reliance on his employer to provide a safe work environment but also his own experience, training, or education. The reasonable person standard, therefore, under a Jones Act negligence action becomes one of the reasonable *seaman* in like circumstances. To hold otherwise would unjustly reward unreasonable conduct and would fault seaman only for their gross negligence, which was not the contemplation of Congress.
>
> By ascribing to seamen a slight duty of care to protect themselves from the negligence of their employers, *Spinks* and its progeny, specifically *Brooks [v. Great Lakes Dredge-Dock Company,* 754 F.2d 536 (1984)] are repugnant to the principles we espouse today and are therefore over-ruled. Moreover, by attributing to Jones Act employers a higher duty of care than that required under ordinary negligence, *Allen [v. Seacoast Products, Inc.*, 623 F.2d 355 (1980)] and its progeny repudiate the reasonable person standard and are also overruled. (Citations omitted.)

[2] As a general rule, appellate courts are bound to adjudge a case before it in accordance with the law existing at the time of its decision. Where the law has changed during the pendency of the suit and retroactive application of the new law is permissible, the new law applies on appeal even though it requires reversal of a trial court judgment that was correct under the law in effect when it was rendered. *Segura v. Frank*, 93-1271, 93-1401 (La. 1/14/94), 630 So.2d 714, 725, *cert. denied*, 511 U.S. 1142, 114 S.Ct. 2165, 128 L.Ed.2d 887 (1994); *Charrier v. Charrier*, 94-921 (La.App. 5th Cir. 3/26/96), 672 So.2d 983, 985, *writ denied*, 96-1561 (La.9/27/96), 679 So.2d 1345.

We are required to review the facts using the standard of care as articulated in *Gautreaux*, as if these legal principles had always been the law. *See Norton v. Crescent City Ice Mfg. Co.*, 178 La. 135, 150 So. 855, 858 (1933).

[3] Mr. Vendetto was a seasoned offshore oil worker, well trained and experienced. Prior to working for Sonat, Mr. Vendetto worked for two years as an assistant mechanic for Louisiana Compressors, where he had to lift and carry heavy objects. He began working for Sonat in 1987, starting as a painter/seaman and was promoted after six months to roustabout, which required him to carry objects weighing up to 100 pounds. He was then promoted to motorman 3, then to motorman 2, than to motorman 1, then to senior motorman, and finally to mechanic 3. During the six years that he worked for Sonat, Mr. Vendetto attended weekly safety meetings. Prior to his injury in 1993, he had worked on two or three 6,000-hour SAMs and had observed others being performed.

The plaintiff's safety expert, Mr. Kubelka, said the method of lowering the chain fall used by Mr. Vendetto would put stress on his back and analogized it to "lifting heavy stuff out of a trunk of a car[.]" However, Mr. Kubelka did not say that this method was unsafe. When asked if the method used was an inappropriate method of performing the assigned task, he answered, "I think it puts more strain on the back than one—than alternate methods, Counselor." Thus, he merely suggested it would be better to use mechanical means to lower the tools.[2]

In this case, the plaintiff had a duty to exercise ordinary care to protect himself. The corresponding duty of Sonat was ordinary care. In determining fault, the trial court, applying *Spinks*, imposed a higher duty on Sonat than is required under the Jones and, further, imposed a lesser duty on Mr. Vendetto to protect himself than the law requires under *Gautreaux*.

Mr. Vendetto was undertaking a common, ordinary task which he had done many times before, and he chose the method by which to lower the tools, which weighed no more than forty pounds. The method he chose to use, according to his safety expert, put stress on his back. However, the injury he suffered was not to his back, but to his neck. There was no testimony that the method Mr. Vendetto used was unsafe, merely that there were other methods which he could have used.

Under the facts of this case, there was no Jones Act negligence on the part of Sonat.

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[2] We find no abuse of discretion by the trial court in allowing Mr. Kubelka to testify.

UNSEAWORTHINESS

[4,5] The duty of seaworthiness is absolute and independent of the duty to exercise reasonable care under the Jones act. The standard is not to provide an accident-free ship; rather, the test to determine if there was an unseaworthy condition is whether the vessel, equipment, or appurtenances were reasonbly fit for their intended use. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549-550, 80 S.Ct. 926, 932-933, 4 L.Ed.2d 941 (1960).

(6) The trial court based its finding of unseaworthiness on the following:

> This court finds that Sonat's failure to ensure that the supervisors on board the rig were following and enforcing the proper safety methods, was a condition that made the vesssel unseaworthy. If a crew is not properly trained in learning how to do their jobs safely, then there is no doubt that it is a "— defective or inadequate crew." When a vessel's personnel does not know how to perform their jobs in a safe manner, then it cannot be said that the vessel is reasonably fit for its intended use.
>
> The standard of causation is more demanding in unseaworthiness claims as opposed to negligence claims and requires proof of proximate ¬causation. *Brister v. A.W.I. Inc.* 946 F.2d 350, 354 (5th Cir. 1991). Causation in unseaworthiness requires a showing of proximate cause which means that (1) the unseaworthiness played a substantial part in bringing about or actually causing the injury or that (2) the injury was either a direct result or

> a reasonably probable consequence of the unseaworthiness. *Alverez v. J. Ray McDermott & Co. Inc.*, 674 F.2d 1037, 1042-43, see also footnote 3 (5th Cir.1982). This court finds that the failure to properly train Joseph Vendetto on how to safely lift and lower tools played a substantial part in bringing about or causing his injury and that the injury was a direct result of the vessel's unseaworthiness, i.e. its improperly trained and supervised crew.

Mr. Kubelka did not state that the method used by Mr. Vendetto to lower tools in this case was unsafe. Rather, he felt it would have been better to use mechanical means, such as a hoist, to lower the tools. However, he admitted that the wrap method, which Mr. Vendetto testified he had safely used before to lower tools during a SAM, could have been used. Mr. Vendetto testified, and the trial court found, that Sonat had self-lifting tapes and safety meetings and placards set out with proper lifting techniques shown. The testimony of the other workers, except Mr. Vendetto who could not remember, was that there was a pre-task meeting. The meeting included a drawing of what work needed to be done. The supervisor went over the procedures and instructed the workers as to the tools that would be needed, as well as safety concerns such as oil leaking and the hazards of falling.

Furthermore, Mr. Vendetto's testimony shows that he had lifted heavier loads many times in the past, that he was aware of proper lifting techniques, and, in fact, he had used them in the past. Under the facts of this case, the trial court committed manifest error in finding that Mr. Vendetto was not properly trained in lifting and that this lack of training made the vessel unseaworthy.

In conclusion, we find that the trial court committed legal error in finding Jones Act negligence on the part of Sonat, and, further, we find that the trial court committed manifest error in its finding of unseaworthiness.

Therefore, for the foregoing reasons, the trial court judgment in favor of Mr. Vendetto and against Sonat is **REVERSED.** Mr. Vendetto is cast with costs.

CARTER, J. dissents and assigns reasons.

FOGG, J., dissents for reasons assigned by Carter, J.

PARRO, J., concurs.

[1]CARTER, Judge, dissenting.

I respectfully disagree with the majority opinion and would affirm the trial court judgment as to liability. Particularly, for the reasons that follow, I cannot agree with the majority's reversal of the trial court's findings that the vessel was unseaworthy and that Sonat was negligent.

STANDARD OF REVIEW

The law is clear that Louisiana courts of appeal should apply the state manifest error standard of review in general maritime and Jones Act cases. *Milstead v. Diamond M Offshore, Inc.*, 95-2446, p. 11 (La.7/2/96); 676 So.2d 89, 96. Claims based on negligence and unseaworthiness are separate and distinct, but the fact finder's conclusions as to each are treated similarly on review. Such findings of fact may not be disturbed unless clearly erroneous. *Caravalho v. Dual Drilling*

Services, Inc., 93-560, p. 4 (La.App. 3rd Cir. 2/2/94); 631 So.2d 725, 728, *writ denied*, 94-0878 (La. 5/13/94); 637 So.2d 1074; *Spangler v. North Star Drilling Company*, 552 So.2d 673, 676 (La.App. 2nd Cir.1989).

LIABILITY

In the instant case, Vendetto argued that Sonat was liable based on two separate theories of recovery, namely unseaworthiness and Jones Act negligence. In his reasons for judgment, the trial court determined that the DISCOVERER 534 was unseaworthy in that it had an improperly trained and supervised crew. Moreover, the trial court determined that Sonat was negligent in its "failure to provide a safe work place by not ensuring that proper safety methods were being enforced by the supervisors on board" and in failing to "make sure the crew members were properly supervised."

A. UNSEAWORTHINESS

It is a well established principle of admiralty law that a vessel owner warrants that his vessel is seaworthy. A seaworthy vessel is one that is reasonably fit for its intended use. This duty to provide a seaworthy vessel requires that its gear, appurtenances and operation must be reasonbly safe. *Reed v. Seacoast Products, Inc.*, 458 So.2d 971, 974 (La.App. 3rd Cir.1984), (citing *Drachenberg v. Canal Barge Co., Inc.*, 571 F.2d 912 (5th Cir.1978)). This duty is a nondelegable liability without fault and is independent of the Jones Act duty to exercise reasonable care. *See Brister v. A.W.I., Inc.*, 946 F.2d 350, 355 (5th Cir.1991). Among the conditions which render a vessel unseaworthy, imposing liability

on a vessel owner for injuries, are defective gear, appurtenances in disrepair, and an unfit or insufficient crew. *Caravalho v. Dual Drilling Services, Inc.*, 631 So.2d at 728; *Spangler v. North Star Drilling Company*, 552 So.2d at 677.

The duty of the vessel owner to provide a seaworthy vessel is absolute in the sense that actual or constructive knowledge by the owner of the unseaworthy condition is not necessary to support liability. Likewise, no showing of due diligence or lack of negligence by the vessel owner can defeat a claim based on unseaworthiness. *Huff v. Compass Navigation, Inc.*, 522 So.2d 641, 644 (La.App. 4th Cir.), *writ denied*, 526 So.2d 797 (La.1988). This is because unseaworthiness is a condition of the vessel, and how that condition arises has been deemed irrelevant to the owner's liability for allowing such a condition to exist. *Huff v. Compass Navigation, Inc.*, 522 So.2d at 644. *See Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498, 91 S.Ct. 514, 517, 27 L.Ed.2d 562 (1971). In order for a plaintiff to recover on an unseaworthiness claim he must not only prove that the vessel was unseaworthy, he must also show that the unseaworthy condition was the proximate (that is the direct and substantial) cause of his injury. *Caravalho v. Dual Drilling Services, Inc.*, 631 So.2d at 728; *Spangler v. North Star Drilling Company*, 552 So.2d at 677; *Huff v. Compass Navigation, Inc.*, 522 So.2d at 644. *See Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1043 (5th Cir. 1982).

In the instant case, in extensive and comprehensive written reasons for judgment, the trial judge painstakingly summarized all of the testimony and documentary evidence and determined that the DISCOVERER 534 was unseaworthy and that its condition played a substantial part in

bringing about Vendetto's injury, stating:

> This court finds that Sonat's failure to ensure that the supervisors on board the rig were following and enforcing the proper safety methods, was a condition that made the vessel unseaworthy. If a crew is not properly trained in learning how to do their jobs safely, then there is no doubt that it is a "defective or inadequate crew." When a vessel's personnel does not know how to perform their jobs in a safe manner, then it cannot be said that the vessel is reasonably fit for its intended use.

Under the facts presented in the instant case and the law discussed above, I cannot say that the trial court's finding that the vessel was unseaworthy is manifestly erroneous.

B. JONES ACT NEGLIGENCE

In contrast to a claim for unseaworthiness, in a claim for negligence under the Jones Act, it is the conduct of the defendant which is at issue, not the defective condition itself. The duty owed by an employer encompasses the duty to exercise reasonable care in the maintenance of a safe work environment. *Ober v. Penrod Drilling Company,* 726 F.2d 1035, 1037 (5th Cir.1984); *Caravalho v. Dual Drilling Services, Inc.,* 631 So.2d at 729; *Spangler v. North Star Drilling Company,* 552 So.2d at 678. Under the Jones Act, an employer also has a duty to supervise or instruct seamen as to safe methods by which they carry out orders given to them. *Babineaux v. Lykes Brothers Steamship Company, Inc.,* 608 So.2d 659, 663 (La.App. 3rd Cir.1992), *writ denied,* 610 So.2d 819 (La. 1993).

I agree with the majority's conclusion that, in light of *Gautreaux v. Scurlock Marine, Inc.*, 95-30250, 95-30272 (5th Cir. 2/28/97); 107 F.3d 331, the trial court applied the wrong standard of care to the facts, both to the duty of the seaman and the duty of the employer, and thus committed legal error.[1] Consquently, it is now necessary to apply the proper standard of care to the facts as found by the trial court, as long as these factual findings are not manifestly erroneous.

In the instant case, the trial judge, in his written reasons for judgment, addressed his findings relative to the negligence of Sonat as follows:

> The defendant was negligent in his duty to provide a reasonably safe workplace to those who worked for him. This negligence stems from his duty to ensure that all workers were instructed in and that they were actually using the proper procedures when lifting and lowering tools. Sonat is liable because the supervisors on board the DISCOVERER 534 were not making sure that proper safety methods were being used on the rig. It is clear that Vendetto was not properly trained in the safe method of lowering and lifting tools.
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> . . . .
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> Furthermore, the court finds that Sonat was negligent, not only in its failure to provide a safe

[1] In fairness to the trial court, it is noted that *Spinks v. Chevron*, 507 F.2d 216 (5th Cir.1975) was overruled by *Gautreaux*, 107 F.3d at 331, after the trial court's decision had been handed down.

> work place by not ensuring that proper safety methods were being enforced by the supervisors on board, but it was also negligent in its failure to make sure the crew members were properly supervised.

After carefully reviewing the entire record, I conclude that in applying the *Gautreaux* standard of care to Sonat, it is clear that Sonat breached its duty to exercise ordinary care when it failed to properly instruct and train its employees on the safe method of lifting and lowering chain falls and that this breach was a proximate cause of Vendetto's injuries.

COMPARATIVE NEGLIGENCE OF VENDETTO

Sonat contends that the trial court erred in failing to assign Vendetto any comparative negligence. Sonat argues that the trial court's determination that the practice utilized in lifting and lowering tools was unsafe is inconsistent with the failure to attribute any fault to Vendetto. Sonat reasons that, if the method was unsafe and Vendetto knew the method well, then Vendetto bears some responsibility for knowing that the method was unsafe.

At the time of the accident, Vendetto was working as a mechanic, assisting with the performance of a routine maintenance procedure. A seaman's duty is to act with ordinary prudence under the circumstances. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d at 339.

After hearing all of the evidence, the trial court refused

to apportion any fault to Vendetto. The trial court apparently determined that Vendetto performed his work with ordinary prudence as he had been instructed, but that Sonat had failed to train or instruct Vendetto as to a safe method to lift and lower chain falls. Applying the *Gautreaux* standard of care, i.e., "the reasonable seaman in like circumstances," Vendetto was not negligent. A review of the record shows that this finding of ordinary prudence on the part of Vendetto is not erroneous.

CONCLUSION

Based on an examination of the record, I conclude that the trial court properly found the vessel to be unseaworthy and Sonat to be negligent. Further, the trial court was legally correct in failing to assign any comparative negligence to Vendetto. I submit that the majority opinion errs in reversing the trial court's judgment. Therefore, for the above and foregoing reasons, I respectfully dissent.

APPENDIX 3

SUPREME COURT OF LOUISIANA

No. 97-C-3103

JAN 20 1999

JOSEPH VENDETTO

Versus

SONAT OFFSHORE DRILLING CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF ST. MARY

LEMMON, Justice*

This is an action to recover damages for personal injuries incurred by a seaman aboard a ship. Plaintiff seeks recovery under the Jones Act, based on the negligence of plaintiff's employer, and under the general maritime law, based on the unseaworthiness of defendant's vessel. The principal issue is the correctness of the holdings by the court of appeal that plaintiff failed to prove Jones Act negligence and that the trial court's finding of unseaworthiness was manifestly erroneous.

Facts

Plaintiff worked for six years for defendant drilling company as a seaman aboard the DISCOVERER 534, a drilling

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* Calogero, C.J., not on panel. Rule IV, part 2, §3.

vessel owned and operated by defendant. He had previously worked for another employer for two years in a job that also required lifting and carrying of heavy objects.

On January 19, 1993, plaintiff, while working as a mechanic[1] on the DISCOVERER 534, was called up to assist with a Sonat automated maintenance (SAM) procedure.[2] While plaintiff had assisted in two or three SAMs previously, this was the first time he was required to perform the task in any capacity other than as a helper.

Performance of the SAM required the lowering of tools and chain falls, weighing thirty to forty pounds, down into the thruster tunnel, a distance of about thirty feet. According to plaintiff, he learned the procedure by watching and assisting others in previous SAMs. While plaintiff did not recall whether his supervisors, John Kelly and Charles Brokaw, had discussed lifting techniques with him before starting the SAM in which he allegedly was injured, other employees verified that there was a planning meeting, attended by plaintiff, before the procedure was begun.

At the beginning of the SAM, other seamen put down a scaffolding. Using the procedure he had seen fellow workers and supervisors use, plaintiff lowered the tools and chain falls with a rope, hand over hand, over the rail of the A-frame to

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[1] During the six years of employment, plaintiff worked his way up through positions of painter (seaman), roustabout (a job requiring lifting objects up to 100 pounds), motorman 3, motorman 2, motorman 1, motorman, and finally mechanic 3.

[2] A SAM is a routine procedure required every 6,000 hours of operation of the thrusters of the vessel, which serve to maintain the vessel in position over an oil well during drilling. A SAM takes about two days to complete. About six SAMs are done per year aboard the vessel.

Eugene Orcutt, who was in the tunnel below. When he was lowering a chain fall, he felt a pain in his neck, but continued working. When his soreness recurred during work the next day, he reported the injury to the medical person on board. Two days later, plaintiff was referred to a doctor, who initially diagnosed muscle strain, but eventually determined that plaintiff had sustained a ruptured disc which required surgery.[3]

This tort action ensued, asserting two theories of recovery: (1) the negligence of defendant in failing to provide proper training in safe methods of lifting and lowering tools, and in failing to ensure that supervisory personnel required employees to utilize safe and proper procedures in performing the SAM; and (2) the unseaworthiness of the vessel arising from the dangers of having an improperly trained and supervised crew.

At trial, plaintiff testified that he had seen and used a "wrap around" as a safe method for lowering tools, but that wraps generally were used only for lowering heavier objects and that there was not enough room to use wraps without getting hung up on obstructions on the tunnel wall. Plaintiff asserted that he was required to swing the chain fall over into the thruster with a rope, away from the side of the thruster, as opposed to lowering it down straight. He admitted, however, that there was a place at the handrail where one could lower tools without having to worry about obstructions and that he had lowered tools from that spot before, but on the day of the accident he used a spot where he had

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[3] Plaintiff's alleged on-the-job neck injury and the causal relationship between that incident and the neck surgery were disputed at trial, but the trial court's factual findings foreclose review of these issues.

to pick up the tools to avoid obstructions. Plaintiff complained that defendant should have provided mechanical equipment to assist in lowering tools.

Kelly, the mechanical supervisor, testified that in addition to the planning meeting before beginning the SAM, which plaintiff attended, safe lifting techniques were frequently discussed at weekly safety meetings. Other evidence established that placards illustrating proper lifting techniques were posted at various places around the ship.

Brokaw, another supervisor, verified the pre-SAM meeting, at which they discussed the SAM procedure, but stated he was not involved in beginning the operation. He testified that the seamen generally used regular rope to lower tools by the hand-over-hand method until the person in the tunnel (who cannot be seen) reaches out and grabs the tool. He never felt the need to use safety wraps in such operations.

The rig safety technician testified that lowering and raising tools thirty feet should be discussed at the pre-task safety meeting, and that there were regular classes and videotapes on back safety and proper lifting techniques.

Orcutt, plaintiff's co-employee, also verified the pre-task meeting on the morning of the SAM.

A materials handling safety expert presented by defendant testified that manually lowering tools weighing forty to fifty pounds about twenty-five feet with a rope was a safe and acceptable procedure if proper techniques were used. He approved the lifting procedures and on-the-job safety programs used by defendant.

An expert in drilling rig operations and safety presented by plaintiff admitted that lowering tools with a rope can be done effectively and safely "without being negligent." However, he criticized defendant for abandoning, because of excessive loss of tools, previously-used mechanical means of lowering tools, noting that mechanical assistance is designed to avoid injury, not to avoid losing tools.

Following a two-day bench trial, the trial court ruled in plaintiff's favor on both theories, awarding a total of $1,048,768 in damages. As to unseaworthiness, the court found the vessel had an improperly trained and supervised crew, and that defendant's failure to ensure that the supervisors on board were following and enforcing proper safety methods resulted in a "condition that made the vessel unseaworthy." The court concluded that the vessel was not reasonably fit for its intended use, because the personnel did not know how to perform their jobs in a safe manner.

As to Jones Act negligence, the trial court noted that the standard of care for negligence is the failing to exercise the care which an ordinary prudent person would use under the circumstances, and that the standard of causation is whether the defendant's negligence played any part, even the *slightest,* in producing the injury. The court ruled that defendant negligently failed to provide a reasonably safe workplace based on virtually the same factors referred to in the unseaworthiness determination, namely defendant's "failure to provide a safe work place by not ensuring that proper safety methods were being enforced by the supervisors on board" and "failure to make sure the crew members were properly supervised." The court observed that plaintiff was not properly trained in the safe method of lowering and

lifting tools, but simply followed the example of those he watched and assisted, and that the supervisors never corrected the use of unsafe methods. However, the court did not articulate how the method used by plaintiff and his co-employees to lift and lower tools was unsafe.

Finally, in finding no contributory negligence, the trial court, citing *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975), noted that a seaman's duty to protect himself is slight, especially when the supervisor knows the method used by the seaman and does nothing about it.

In the interim between the trial court's judgment and the court of appeal's review of the case, the federal court of appeals in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997), overruled *Spinks* and several other cases which had used loose language such as "slight negligence" in describing the standard of care in Jones Act negaligence cases. The court in *Gautreaux* held that a Jones Act seaman is required to act as a reasonable seaman under like circumstances, and that a Jones Act employer is required to act as a reasonable employer under like circumstances.

On apeal in the present case, the court of appeal noted that *Gautreaux* had overruled the *Spinks* case relied upon by the trial court in the contributory negligence analysis. 960,636 (La.App. 1 Cir. 9/23/97); 701 So. 2d 243. Applying *Gautreaux*, the intermediate court reviewed the facts under the standard of care stated therein.

The intermediate court, characterizing the task plaintiff was assigned to perform as "a common, ordinary task" that he had done "many times before," held that although other methods of lowering the tools were available, the

method selected was not "unsafe." Further emphasizing that plaintiff had selected the method for lowering the tools from among several methods known and available to him, the court concluded that Jones Act negligence on defendant's part was not proved.

As to the unseaworthiness of the vessel, the court of appeal held that the trial court's findings that plaintiff "was not properly trained in lifting and that this lack of training made the vessel unseaworthy" were manifestly erroneous. 960,626 at p. 7 (La.App. 1 Cir. 9/23/97); 701 So. 2d 243, 248.

We granted certiorari to address the correctness of that decision. 97-3103 (La. 3/20/98); 715 So.2d 1194.

Negligence Standard of Care in Jones Act Cases

The Jones Act provides the same rights to seamen that are provided to railway employees under the Federal Employers Liability Act (FELA), which in pertinent part makes the employer liable for injury "resulting in whole or in part" from the negligence of the employer's officers, agents or employees. 45 U.S.C. §51 (&1982). While the language of FELA suggests a reduced standard of causation, nothing in FELA or the Jones Act suggests a variation from the ordinary standard of care used in evaluating negligence in ordinary tort cases, namely, reasonable care under the circumstances.

In *Rogers v. Missouri Pacific R.Co.*, 352 U.S. 500 (1957), the court used the FELA language to articulate the test whether the employer's negligence played any part, even the *slightest,* in producing the injury. *See Ferguson v. Moore - McCormark Lines, Inc.,* 352 U.S. 521 (1957), which used

similar language in a Jones Act case. Moreover, in *Lavender v. Kurn*, 327 U.S. 645 (1946), the Court earlier had indicated a less stringent evidentiary threshold for the trial judge to submit the employer's negligence question to the jury or to sustain a jury verdict in Jones act and FELA cases.

Despite the lack of any statutory basis, the term "slight" crept into decisions of the lower federal courts on issues other than the causation prong of the liability determination. In regard to the negligence of the Jones Act or FELA employer, *see e.g., Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969)(en banc)(slight negligence means the failure to exercise *great* care, implying a higher standard of care for Jones Act employers than other tortfeasors); and in regard to the contributory negligence of the seaman, *see, e.g. Spinks v. Chevron Oil Co., supra* (while the Jones act employer's breach of the standard of care is based on the "slightest negligence," the seaman has only a *slight* duty to protect himself). Some decisions even characterized the seaman's burden of proof of the employer's fault as "featherweight." *See, e.g., Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186, 188 (5th Cir. 1991).

The loose language of decisions implying a higher standard of care on Jones Act employers has been extensively criticized. *See* Robert Force, *Allocation of Risk and Standard of Care under the Jones act: "Slight Negligence," "Slight Care?"* 25 J.Mar.L. & Com. 1 (1994); Brian J. Miles, *The Standard of Care in a Seaman's Personal Injury Action - Has the Jones Act Been Slighted?* 13 Tul.Mar.L.J. 79 (1988). The federal Fifth Circuit finally confronted the issue *en banc* in *Gautreaux*, which as noted earlier was decided after the trial court judgment in the present case.

In *Gautreaux,* the plaintiff, a relief captain on a push boat, had been instructed by the permanent captain that a manual crank handle could be used to override the electric switch on the winch if it failed, but had not been told to remove the handle on the winch motor when attempting to engage the winch by use of the electric switch. When the plaintiff used the crank handle to override the electric switch and turned the handle while simutaneously pressing the switch, the handle flew off and struck the plaintiff. In the ensuing trial, the judge instructed the jury that seamen were bound only to a duty of slight care for their own safety, and the jury apportioned ninety-five percent fault to the employer and five percent fault to the seaman.

The court of appeal, after surveying the far-ranging earlier opinions of that court on the issue, held that the FELA and the Jones Act do not distinguish between degrees of negligence and that the standard of care, both for Jones Act employers and for Jones Act seamen, is to act as an ordinarily prudent person would act under similar circumstances. Pointing out that the circumstances of a seaman's employment include not only his reliance on his employer to provide a safe work environment but on his own experience, training and education, the court concluded that the reasonable person standard in a Jones Act negligence action is that "of the reasonable *seaman* in like circumstances." 107 F.3d at 339 (emphasis in original). See also Ronald K. Schuster, *Standard of Care in Jones Act Negligence Cases — From Slight to Ordinary Care: Gautreaux v. Scurlock Marine Inc.,* 22 Tul.Mar.L.J. 315 (1997).

Though not bound by the Fifth Circuit's decision, we

agree with the holding and the reasoning.[4] In a Jones Act case, the court should determine the negligence of the employer according to the standard of a reasonable employer under like circumstances, and should deteremine the contributory negligence of the seaman according to the standard of a reasonable seaman under like circumstances. *Foster v. Destin Trading Co., supra.*

Nevertheless, since the duty to provide a safe place to work allocates substantial risks of maritime employment to the employer, identical conduct is not demanded of the employer and the employee. Force, *supra* at 3, 19. The law allocates different risks to different parties, and that allocation forms parts of the reasonableness equation in the negligence determination. A defendant's standard of care, like that of the plaintiff, varies according to the conduct in which the party is engaged. Frank L. Maraist & Thomas C. Galligan, *Louisiana Tort Law* §39-2 (1996). *See also Argus v. Scheppergrell,* 472 So. 2d 573 (La. 1985)(when a doctor prescribed large amounts of drugs to a young patient known by the doctor to be a drug addict, the doctor was in a greatly superior position to avoid the risk of the patient's death from a drug overdose, and was not allowed to defeat recovery, under the then rule of contributory negligence, by pleading the exact conduct by the patient that was the risk prompting imposition of the duty on the doctor not to prescribe large amounts of drugs). The determination of who had the duty to eliminate or minimize the risks of an injury-causing hazard

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[4] In *Foster v. Destin Trading Corp.*, 96-0803 (La. 5/30/97; 700 So. 2d 199 (on reh'g), this court cited with approval the standard of care announced in *Gautreaux*, but alluded (as *Gautreaux did)* to the necessity only of "slight" evidence to meet the burden of proving the causation prong of the liability determinatiion.

is central to the negligence inquiry. The duty on the employer to make the work place safe may, in a sense, impose a greater duty on the employer than the duty on the seaman to use reasonable care for his own safety. *See* Force, *supra* at 19. But irrespective of the duty imposed, the standard of care on both an employer and a seaman is that of a reasonable person in the same position under like circumstances.

Jones Act Negligence in the Present Case

While the parties argue over the impact on the present appeal of the intervening *Gautreaux* decision, the critical issue is whether plaintiff established that the method used in the SAM was unsafe for lowering and lifting tools. Absent a showing that the method utilized by plaintiff was unsafe, there can be no finding of negligence by the defendant on which to hinge an imposition of liability under the Jones Act.

Implicit in the trial court's judgment in plaintiff's favor was a finding that the method used by plaintiff was unsafe. However, the record simply does not support a finding that this meethod of lowering and lifting a chain fall weighing thirty to forty pounds was unsafe.

The trial court agreed that tools and chain falls could be safely lowered with a rope. The evidence suggested three ways that can be used to lower tools on a rope: hand-over-hand, the wrap method (putting a wrap of the rope around a handrail to shift most of the weight to the rail), and simply playing out the rope over the handrail. None of these methods was shown to be unsafe. Nor was there any evidence that the method plaintiff selected to use — hand-over-hand —

presented an unreasonable risk of harm.

The expert in drilling operations and safety presented by plaintiff simply testified that if plaintiff lowered tools manually from Location No. 1 while leaning over the handrail, it would "put stress on a man's back," and, in response to a question whether this manner of doing the task was inappropriate, the expert answered that "I think it puts more strain on the back than one — than alternative methods" such as mechanical means. The expert thus opined not that the method was unsafe or posed an unreasonable risk of injury, but that it puts stress on the plaintiff's back "analogous to lifting heavy stuff out of a trunk of a car," a common task performed every day by ordinary people without incident.

All the experts agreed the hazard, if any, was an ordinary one recognized by ordinary workers. The expert presented by plaintiff stated that use of a rope was not unsafe and was not negligent. Here, the risk of harm from lowering an object weighing only thirty to forty pounds is relatively minor, and this is a routine task commonly encountered by shipboard workers.

Both the trial and appellate courts agreed that defendant was not at fault for failing to provide a mechanical means for performing the task. Factually, the trial court agreed with defendant that "mechanical means were not necessary and that there are safe means of manually lowering and lifting tools." Legally, the court of appeal found this case analogous to *Rogers v. Eagle Offshore Drilling Services, Inc.*, 770 F.2d 549 (5th Cir. 1985), in which the court held that while a mechanical means of doing the task was preferable, the failure to use an available mechanical means

did not render the manual means of doing the job unsafe, given the lack of evidence the manual method itself was unsafe. "The failure to use an available method to accomplish the same work does not render a given method of performing the work unsafe." 770 F.2d at 550.

Furthermore, mere failure to instruct and supervise does not equate to Jones Act negligence when the seaman is fully knowledgeable of the available safe method. *See, e.g., Grover v. American President Lines, Inc.*, 1995 A.M.C. 2105 (N.D. Cal. 1995). In *Grover*, the seaman's assigned task was connecting electrical cords for refrigeration units used to store cargo on deck. While attempting to reach s plug outside of his arm's reach (and admitting that he first considered getting a ladder), the seaman climbed on a rail and injured himself. Rejecting the seaman's argument that the employer was negligent in failing to properly instruct him in the proper procedures for plugging in electrical cables, the court noted testimony establishing it was "common knowledge among experienced seamen that sailors should use ladders instead of climbing because men 'are not monkeys.' " *Id.* at 210. Further observing that plaintiff was an experienced seaman and never denied knowing this "common knowledge safety tip," the court held that plaintiff failed to prove his employer was negligent in failing to remind him of what "he already knew or should have known." *Id.* at 2108. The court further reasoned that "plaintiff never testified that his decision not to seek or use a ladder would have been different had he been specifically instructed at some time prior to the accident that he should use a ladder. That is, there is no evidence that the absence of instructions on ladder use was even a cause, However slight, of his injury." *Id.* at 2108 (emphasis in original). *See also Robinson v. Zapata Corp.*, 664

F.2d 45, 48 (5th Cir. 1981)(holding that "[d]efendant could not have been negligent in failing to properly supervise or train an employee in off-shore welding when that employee clearly stated that he had two years experience in off-shore welding.")

Similar to the situations presented in *Grover* and *Robinson*, plaintiff failed in this case to present any evidence to support a finding that defendant's failure to instruct him on proper lifting and lowering procedures, of which he admitted he had knowledge, was even a cause, however slight, of his injury. Plaintiff admitted he knew all three methods of manually lifting and lowering with a rope, and that he elected to do the task hand-over-hand. Moreover, plaintiff's supervisor, Kelly, testified in his deposition that the reason he did not instruct on safe lifting in the pre-task meeting was that "[i]t's common knowledge to throw your wrap around the pole right there" and that "[i]t's common sense" and not a matter requiring any special training.

The trial court's judgment in plaintiff's favor on the negligence claim was based on defendant's failure to adequately instruct, train and supervise him in safe lifting and lowering tools for a SAM. The trial court recognized that plaintiff had substantial training and experience, yet concluded that "the supervisors on board the DISCOVERER 534 were not making sure that proper safety methods were being used on the rig. It is clear that Vendetto was not properly trained in the safe method of lowering and lifting tools." The evidence, however, established that plaintiff was trained to use, and had actually used, safe methods of lifting and lowering tools. Plaintiff testified that he was trained in safe lifting principles. He had eight years experience working

offshore performing these types of elementary tasks. He viewed videotapes on safe lifting, attended safety meeting on a regular basis at which safe lifting basics were addressed, and observed safety placards posted on the vessel. Before the accident, plaintiff had observed others lower tools, had used the wrap method and knew it was a safe method, and had lowered tools and equipment on a rope for work on this particular thruster. All of the supervisors testified that they had not observed plaintiff using an unsafe method of lifting or lowering tools and that he was competent and trained.

The trial court's focus on the testimony of the expert on drilling rig operations and safety that plaintiff was "in training," which was noted on one of plaintiff's evaluation reports, was misplaced. plaintiff was not in training to learn the basic task of lifting and lowering tools; he was in training to learn how to do backlash readings, variable readings, and measurements with dial indicators, and to properly record such readings. These higher level skills were the type of things for which plaintiff needed additional training, and not the basic level skill of lifting and lowering.

The absence of a written report of a pre-task meeting was another factor emphasized by the expert. The witnesses, save for plaintiff who could not recall, all testified that there was a pre-task meeting at which Kelly drew out what needed to be done. Kelly went over the procedures, what tools were needed, and discussed safety concerns such as oil leaks and hazards of falling. Orcutt and plaintiff then met and discussed between them who would do what aspects of the job. Defense witnesses, including Kelly, testified that it was unnecessary to discuss safe lifting at every pre-task meeting because plaintiff already knew them, having attended safety seminars,

watched videotapes on the subject, and been trained in safe lifting techniques.

Moreover, the lack of instruction or supervision was not a cause of the accident. Plaintiff failed to show that he would have done anything differently if he had been instructed further or provided with additional supervision. Indeed, plaintiff testified his supervisors had previously seen him do everything he did on the day of the accident and had never seen fit to correct him. The trial court's reliance on these factors to impose liability on defendant was incorrect, inasmuch as any lack of instruction or supervision was simply not a cause-in-fact of plaintiff's injury.

Unseaworthiness

An owner of a vessel has an absolute duty to furnish a seworthy vessel, and a breach of that duty gives rise to a claim for general damages. To state a cause of action for unseaworthiness, the plaintiff must allege an injury "caused by a defective condition of the ship, its equipment or appurtenances. . . . Members of the crew of a vessel are also warranted as seaworthy, and there may be liability for . . . negligent orders, or for utilizing an understaffed or ill-trained crew." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* §6-25, at 333-34 (2d Ed. 1994). Whether a vessel is unseaworthy is a factual question to be decided on a case-by-case basis. *Id.*

An isolated act of operational negligence will not suffice to create an unseaworthy condition; rather, operational negligence must be "pervasive" or repeated frequently for it to rise to the level of an unseaworthy condition as in an

"improper method of operation." *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971); *Robinson v. Showa Kajun K.K.*, 451 F.2d 688 (5th Cir. 1971)(distinguishing "isolated" negligent acts from *congeries* of negligent acts that can create a condition connected to the status of the vessel).

Although the duty of seaworthiness is absolute and does not require negligence, the mere fact an accident occurred does not establish unseaworthiness. The plaintiff bears the burden of proving that "the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness." *Foster v. Destin Trading Corp.*, 96-803, p. 7 (La. 10/21/97; 700 So. 2d 199, 209 (on reh'g)(quoting *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1354 (5th Cir. 1988).

The basis for the trial court's finding of unseaworthiness in the present case was defendant's failure to train, instruct or supervise its employees. Such conduct can amount to an unseaworthy condition if it is pervasive and repeated frequently. *See Brown v. Cliff's Drilling Co.*, 638 F.Supp. 1009 (E.D. Tex. 1986)(the employer provided no instruction or training of any kind, held no safety meetings until after accidents occurred, provided no supervision and simply "assumed people knew what to do"). Here, however, defendant provided instructions to plaintiff on safe lifting at weekly safety meetings and in other forms such as safe lifting video tapes (which plaintiff viewed) and placards posted around the vessel (which plaintiff acknowledged seeing). A pre-task meeting was held at which the means of performing the SAM were discussed (although safe lifting was not expressly addressed). Further, plaintiff was supervised. While two of

plaintiff's supervisors (Kelly and Brokaw) were engaged in another operation at the same time the SAM was being performed, plaintiff was not left to do the task alone; a higher level mechanic, Orcutt, was working with him. Indeed, the trial court noted in its factual findings that Orcutt was in a supervisory position over plaintiff, and Orcutt worked with plaintiff for the entire SAM. Given this record, the court of appeal correctly concluded that the trial court's factual findings were inconsistent with its finding of unseaworthiness and held that such finding was manifestly erroneous, stating:

> [Plaintiff's expert) did not state that the method used by Mr.Vendetto to lower tools in this case was unsafe. Rather, he felt it would have been better to use mechanical means, such as a hoist, to lower the tools. However, he admitted that the wrap method, which Mr. Vendetto testified he had safely used before to lower tools during a SAM, could have been used. Mr. Vendetto testified, and the trial court found, that Sonat had self-lifting tapes and safety meetings and placards set out with proper lifting techniques shown. The testimony of the other workers, except Mr. Vendetto who could not remember, was that there was a pre-task meeting. The meeting included a drawing of what work needed to be done. The supervisor went over the procedures and instructed the workers as to the tools that would be needed, as well as safety concerns such as oil leaking and the hazards of falling.
>
> Furthermore, Mr. Vendetto's testimony shows that he had lifted heavier loads many times in the past, that he was aware of proper lifting techniques, and, in fact, he had used them in the past. Under the facts of this case, the trial court committed manifest

> error in finding that Mr. Vendetto was not properly trained in lifting and that this lack of training made the vessel unseaworthy.

960,626 at p. 7; 701 So. 2d at 247-48.

Summarizing, it is internally inconsistent to say that plaintiff locked proper training in safe lowering and lifting of tools when plaintiff (1) admitted he was trained in safe lifting principles, (2) had eight years off-shore experience, (3) admitted he knew how to accomplish this particular task safely, and (4) previously had accomplished this particular task safely without incident or injury. The court of appeal thus correctly concluded that it was manifestly erroneous to hold plaintiff lacked proper training on safe lowering and lifting. *Canter v. Koehring,* 283 So. 2d 716, 724 (La. 1973); *Milstead v. Diamond M. Offshore, Inc.,* 95-2446 (La. 7/2/96); 676 So. 2d 89 (holding that standard of appellate review in admiralty cases decided in state court is not federal standard but rather Louisiana's manifest error standard).

Decree

For the foregoing reasons, the judgment of the court of appeal is affirmed.

APPENDIX 4

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 011

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *12th day of February, 1999,* the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARINGS DENIED:

97-C - 3103 JOSEPH VENDETTO v. SONAT OFF-SHORE DRILLING CO. (Parish of St. Mary)
CALOGERO, C.J. - not on panel.
JOHNSON, J. - would grant a rehearing.

98-K - 0341 STATE OF LOUISIANA v. BERNELL JULUKE, JR. (Parish of Orleans)
JOHNSON, J. - would grant a rehearing.
TRAYLOR, 3. - not on panel.

98-C - 1263 WASHINGTON G. B. BRYAN v. THE CITY OF NEW ORLEANS, ET AL. (Parish of Orleans)
CALOGERO, C.J. - would grant a rehearing.
MARCUS, J. - not on panel.
JOHNSON, J. - would grant a rehearing.

98-B - 1926 IN RE: DONALD O. PINKSTON

MARCUS, J. - not on the panel.

JOHNSON, J. - would grant a rehearing.